EXTRACTS FROM RECORD, CASE No. 13,977.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 78.

WILLIAM J. CONNELL, FREDERICK H. LAY, AND HERBERT M. TENNY, APPELLANTS,

vs.

JOHN A. SMILEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

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1 Pleas before the Honorable David J. Brewer, judge of the circuit court of the United States for the eighth circuit and district of Nebraska, at the term of May, A. D. 1888.

Be it remembered that on the 12th day of November, 1887, a transcript from district court of Douglas county, Nebraska, was filed in office of the clerk of said circuit court; which said transcript is in words and figures following, to wit:

Be it remembered that heretofore, to wit, on the 16th day of March, A. D. 1887, John A. Smiley, by Savage, Morris & Davis, his attorneys, filed in the office of the clerk of said court his petition against William J. Connell, Herbert M. Tenny, and Frederick H. Lay; which said petition reads and is in the words and figures following, to wit:

In the District Court of the County of Douglas, State of Nebraska.

JOHN A. SMILEY
vs.
WILLIAM J. CONNELL } Petition.

The plaintiff for cause of action herein states that he is and for more than fifteen years has been the owner and in the actual possession and occupancy of the following-described real estate in said county and State, viz., the west half of the southeast quarter of section three, in township fifteen north, of range thirteen east, of the 6th P. M., according to the U. S. Gov't survey.

That in the year A. D. 1874 a corporation was organized, under the laws of the State of Nebraska, under the name of "the Union Stock Yards Company of Nebraska," and negotiations were had between the projectors of said corporation and plaintiff for the sale to said corporation of the above-described real estate.

2 As a part of said negotiations the plaintiff signed a deed wherein said corporation was named as grantee of said land, which deed was delivered to one E. F. Smythe, as attorney for plaintiff, to be held by said Smythe, as such attorney until the said corporation should comply with the terms of such sale on its part agreed to be performed, which were to deliver to plaintiff stock in said corporation to the amount of $28,000.00, it being further understood and agreed that said deed was not to be delivered nor such stock taken unless said corporation was fully organized and ready to engage in business.

The plaintiff further states that no other consideration was ever paid plaintiff for such sale so agreed to be made, and that no stock was ever delivered or offered to plaintiff.

That the stock of said corporation was not subscribed for in amounts sufficient to enable them to become fully organized.

That said corporation never engaged in business, but was abandoned by the projectors thereof.

That no delivery was ever made of said deed or intended to be made except as above set forth.

That notwithstanding the premises the said Smythe on February 20th, 1875, caused the said deed to be placed on record in the office of the county clerk of said county without the consent or knowledge of plaintiff.

That on the 13th day of February, A. D. 1879, one Frederick Lay recovered against the said "The Union Stock Yards of Nebraska" a judgment in this court for the sum of $1,398.00 and costs in an action therein pending, wherein said Lay was plaintiff and said "The Union Stock Yards of Nebraska" was defendant.

That thereafter and on the 17th day of August, 1881, an execution was issued on said judgment and levy made thereof on
3 the land hereinbefore described, which was sold by the sheriff of said county to one John I. Redick and the defendant herein and a sheriff's deed executed therefor which was recorded in the office of the county clerk for said county.

The said Redick thereafter quitclaimed his interest therein to defendant Connell.

The plaintiff further states that the said Connell was the attorney for said Lay in said suit and in procuring said sales; that no money was paid by said Connell on said purchase, and that the consideration for said purchase was only a credit upon said judgment for the amount bid by Connell for said land; that said Connell never paid to said Lay any part of the amount so bid; that during all said time said Connell knew that said Union Stock Yards Company had no interest in said land.

During all of said time said plaintiff had no knowledge that said deed was of record or of said levy or sheriff's sale.

Upon plaintiff's discovery of the record of said deed he demanded of said Union Stock Yards Company a quitclaim deed from it of said land, and, accordingly, on the 10th day of December, A. D. 1885, a reconveyance of said property to plaintiff was made.

On the 12th day of March, A. D. 1887, the said Lay in writing assigned said judgment to the plaintiff and executed and delivered to plaintiff a quitclaim deed of said land and in writing directed said Connell to convey to plaintiff any apparent interest he might have in said land or the proceeds of said execution sale.

The plaintiff therefore shows the court that by the reason of the premises the said execution sales cast a cloud on the title of plaintiff to said real estate, and the plaintiff prays the court to adjudge and decree that said Connell took no interest in said land by reason of said sale upon execution issued on said judgment;
4 that the said sheriff's deeds be set aside and the title to said land quieted in plaintiff, and for such other relief as may be equitable, and for costs of suit.

SAVAGE, MORRIS AND DAVIS,
Attorneys for Pl'ff.

STATE OF NEBRASKA, }
County of Douglas. }

John A. Smiley, being sworn, on oath says he is the plaintiff in the foregoing petition. The statements therein contained are true.

JOHN A. SMILEY.

Subscribed and sworn to before me this 16th day of March, 1887.

WM. H. IJAMS, *Clerk*,
By V. M. MACKEY, *Deputy*.

Thereupon summons was issued herein as follows, to wit:

STATE OF NEBRASKA, }
Douglas County, } *ss*:

The State of Nebraska:

You are hereby commanded to notify the defendant, William J. Connell, that he has been sued by John A. Smiley in the district court for said county; that unless he answers on or before the 18th day of April, A. D. 1887, the petition of the said plaintiff against him filed in the clerk's office of said court such petition will be taken as true and judgment rendered accordingly. You will make due return of this summons on the 28th day of March, A. D. 1887.

Witness my signature and the seal of said court, at Omaha, this 16th day of March, A. D. 1887.

[SEAL.]

WM. H. IJAMS, *Clerk*,
By V. M. MACKEY, *Deputy*.

Afterwards and on the 21st day of March, 1887, said summons was returned with the sheriff's return endorsed thereon as follows, to wit:

5 STATE OF NEBRASKA, }
Douglas County, } *ss*:

Received this writ on the 16th day of March, 1887, and served the same on the 17th day of March, 1887, on the within-named William J. Connell by delivering to him personally in Douglas county, Nebraska, a true and duly certified copy thereof, with all the endorsements thereon.

WM. COBURN, *Sheriff*.

Fees	75
Mileage	10
	85

Paid by clerk.

Afterwards and on the 19th day of April, 1887, a motion for time to answer was filed herein as follows, to wit:

District Court, Douglas County, Nebraska.

JOHN A. SMILEY
vs.
WM. J. CONNELL. } Motion for Time to Answer.

And now comes said defendant and moves the court for an extension of the time to file an answer herein of 20 days from the hearing of this motion.

W. J. CONNELL,
Att'y for Def't.

Afterwards, at the January term of said court, and on the 30th day of April, 1887, an order was entered herein as follows, to wit:

JOHN A. SMILEY
vs.
WM. J. CONNELL. } Motion.

On motion, defendant is allowed to answer herein within thirty days.

Afterwards and on the 7th day of May, 1887, depositions for plaintiff were filed herein as follows, to wit:

Deposition of J. H. Muldoon, a witness, taken before me, Harry A. Sullivan, a notary public in and for the county of Cook, State of Illinois, on the 5th day of May, 1887, between the hours of ten o'clock a. m. and four o'clock p. m., at the office of J. H.
6 Muldoon, No. 230 La Salle street, in the city of Chicago, county of Cook and State of Illinois, pursuant to the annexed notice, to be read in evidence on behalf of the plaintiff in an action pending in the district court of the county of Douglas, State of Nebraska, in which John A. Smiley is plaintiff and William J. Connell is defendant.

J. H. MULDOON, of lawful age, being by me first duly cautioned and solemnly sworn, as hereinafter certified, deposeth and says as follows, to wit:

Interrogatory first. What is your name, age, occupation, and place of residence?

Answer to interrogatory first. John H. Muldoon; age, twenty-two; proprietor of a mercantile and collection agency and claim adjuster; Chicago, Illinois.

Interrogatory second. How long have you resided in Chicago?

Answer to interrogatory second. Have permanently resided in Chicago since February 15th or thereabouts, 1886.

Interrogatory third. Do you know the parties to this action and one Doctor F. H. Lay?

Answer to interrogatory third. I do, but my acquaintance with Lay consists in correspondence of agent and client.

Interrogatory fourth. When did that correspondence commence?

Answer to interrogatory fourth. Some time in the latter part of 1886.

Interrogatory fifth. Were you at any time employed by Dr. Lay to adjust a claim of his against the Union Stock Yards of Nebraska?

Answer to interrogatory fifth. I was about January 10th, 1887.

Interrogatory sixth. State what that claim consisted of at that time.

Answer to interrogatory sixth. There was a judgment of $1,398.00 in favor of Lay and against the Union Stock Yards of Nebraska.

7 Interrogatory seventh. State what transaction took place relative to the said claim.

Answer to interrogatory seventh. The judgment had been in the hands of one W. J. Connell and had been lying without action being taken for some years.

I ascertained the condition it was in and had considerable correspondence relating to it. Doctor Lay referred to me at one time a letter he had received from Connell, which I subsequently returned to Doctor Lay.

The substance of the letter was to the effect that the chances for realizing cash upon the claim were very poor, yet if Lay would dispose of his entire interest in the matter for a reasonable sum he, Connell, might be disposed to advance such amount and take his chances. The letter was dated about the 15th of January and was received by Lay before he had heard from me.

I subsequently received a letter dated January 25th, 1887, from Lay stating that this was the first he had ever heard from the case other than an occasional postal card, and had not been advised before even as to the amount of his judgment.

About the 9th of February, 1887, John A. Smiley called upon me in Chicago for the purpose of settling the judgment. He said that he did not recognize any indebtedness to Doctor Lay and that the judgment had been obtained during his absence from Omaha and without his knowledge, but upon being reminded that there was a judgment he expressed a desire to pay what he called "blood money" for Doctor Lay's interest in the matter. My arrangements with Doctor Lay were at that time incomplete, and I desired to consult Connell, and examined certain records having reference to the case at Omaha, but hesitated at assuming the trouble and expense of such a journey, at which

8 Smiley volunteered to pay me my expense for going in order to save delay. I agreed to go, reserving all privileges in the interest of my client. Arriving at Omaha on the 12th day of March, 1887, and securing an interview with Connell on the 12th, I stated to him that I had come to Omaha in the interest of Doctor Lay in reference to his claim against the Union Stock Yards Company, and, inasmuch as he had also been employed in the case and, as I understood, claimed an interest in the proceeds, I was desirous of getting at as nearly as possible the value of Dr. Lay's interest. I was promptly told by Mr. Connell that Dr. Lay's interest in the matter was just three hundred dollars; that he, Connell, had made

a proposition to Dr. Lay for a settlement—to pay Dr. Lay $300.00, which he held at Dr. Lay's disposal—and that Dr. Lay had accepted the proposal. I told him that other parties desired to purchase Dr. Lay's interest in the matter and that I wished to get as much for it as I could and asked him if he had any other proposition to make for a settlement with Dr. Lay. He assured me that he had not and that he proposed to hold Dr. Lay to his agreement to take $300.00 for his, Dr. Lay's, interest in the matter. That is the substance of my conversation with Mr. Connell. I thereupon made a settlement with Mr. Smiley, receiving $1,500.00 for a release and assignment of Dr. Lay's interest in the judgment and proceeds on execution sale. Smiley also paid me $150.00 for my expenses, as he had agreed, and I executed an assignment and left with him the power of attorney from Dr. Lay to myself. I also took a bond from him to hold Lay harmless from all claims of Connell by reason of his employment as attorney in said case. The bond I sent to Lay with my remittance and it has been retained by him.

J. H. MULDOON.

9 I, Harry H. Sullivan, a notary public in and for the county of Cook, State of Illinois, do hereby certify that J. H. Muldoon was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed as above set forth was reduced to writing by Alfred Post, who is not interested in the suit, in my presence and in the presence of the witness, and was subscribed by said witness in my presence, and was taken at the time and place specified in the annexed notice; that I am not counsel, relative, or attorney of either party or otherwise interested in the result of the said suit.

In testimony whereof I have hereunto subscribed my name and affixed my official seal, at Chicago, in said county and State, this 5th day of May, A. D. 1887.

[SEAL.] HARRY A. SULLIVAN,
Notary Public.

(Four pages this included.)

Said deposition was enclosed in a sealed envelope and endorsed as follows, to wit:

John A. Smiley *vs.* William J. Connell. Deposition in said action on behalf of plaintiff. This deposition taken, sealed up, endorsed, and addressed and transmitted by me, H. A. Sullivan, notary public, clerk of district court, Omaha, Neb., 3rd judicial district. Filed May 7th, 1887. Wm. H. Ijams, clerk. Opened at request of defendants May 25, 1887. Wm. H. Ijams, clerk.

Afterwards and on the 17th day of May, 1887, depositions for plaintiff were filed herein as follows, to wit:

Deposition of a witness taken before me, W. N. Williams, a notary public within and for the county of Douglas, in the State of Nebraska, on Saturday, the 14th day of May, in the year 1887, at ten o'clock a. m., at the office of A. C. Wakeley, in the city of Omaha and in said county, pursuant to the annexed notice, to be read in evidence in behalf of the plaintiff in an action pending in the district court in which John A. Smiley is plaintiff and M. J. Connell is defendant.

H. K. SMITH, of lawful age, being by me first duly examined, cautioned, and solemly sworn as hereinafter certified, deposeth and sayeth as follows, viz:

H. K. SMITH, being duly sworn and examined by Mr. DAVIS, testified as follows:

1 Q. State your name, age, residence, and occupation.

A. Henry K. Smith; age, 56; occupation, travelling agent; residence, Chicago.

2 Q. Where did you live from 1873 up to 1880?

A. Omaha.

3 Q. Were you acquainted with the facts connected with the organization of the Union Stock Yards of Nebraska?

A. I was.

4 Q. Were you in any manner connected with said company? If so, state in what manner.

A. I was president of the organization.

5 Q. About what time was that company organized?

Objected to by counsel for defendant as not the best evidence. Question withdrawn.

6 Q. Do you know John A. Smiley?

A. Yes, sir.

7 Q. How long have you known him?

A. I have known him a long time; perhaps fifteen or sixteen years.

8 Q. Do you know of any business transactions between the Union Stock Yards of Nebraska and John A. Smiley concerning the purchase or an agreement for the purchase of certain lands by said company from said Smiley?

Objected to by counsel for defendant as irrelevant, immaterial, and incompetent.

11 A. Yes, sir; there was an agreement of that kind with Mr. Smiley.

9 Q. Mr. Connell, I wish to interrupt to ask the witness if the agreement he now refers to was in writing.

A. I don't recollect whether it was in writing or not.

10 Q. Was it subsequently merged in writing or in a deed?

A. It was subsequently merged into a deed. It was to be held in trust until the organization was completed.

Mr. CONNELL: I shall object to the witness stating anything concerning any business arrangements that was in writing or which was, as he states, subsequently merged in a writing.

11. Mr. DAVIS: State what that transaction was.
Mr. CONNELL: I object for the reason stated above.
The WITNESS: Mr. Smiley was to execute a deed to a certain lot of land in North Omaha to the Union Stock Yards Company, to be held in trust until that organization was completed.
Mr. CONNELL: I further object to the statement of the witness and move to have it stricken out for the additional reason that no trust can be created by parole, and that the deed itself is the best evidence as to whether or not any such trust was expressed in the deed.

12. Mr. DAVIS: What was done with that deed?
A. It was placed in the hands of Col. Smythe.
13 Q. For what purpose was it left with him?

Objected to by counsel for defendant as immaterial and irrelevant.

A. To be held in trust by him until the completion of the organization.
14 Q. What do you mean by being held in trust?

12 Objected to by counsel for defendant as immaterial, irrelevant, and calling for the conclusion of the witness.

A. Until the stock was disposed of to the full amount, then the deed was to be transferred to the stock yards company.
15 Q. What was the consideration to be paid by the company for the lands?

Objected to by counsel for defendant as immaterial, irrelevant, and incompetent, the deed itself being the best evidence of consideration.

A. I think it was somewhere from $25,000.00 to $28,000.00. I don't recollect exactly, but it was near that.
16 Q. State whether or not this consideration was paid.

Objected to by counsel for defendant as immaterial, irrelevant, and incompetent.

A. Not to my knowledge. I don't think there was ever a dollar paid.
17 Q. Do you know where the records of the company now are?
A. I do not.
18 Q. What amount of stock, if any, was subscribed by the individuals in said corporation?

Objected to by counsel for defendant as immaterial, irrelevant, and incompetent, and not the best evidence.

A. I don't recollect what amount.

19 Q. Do you know whether or not any was subscribed?

Same objection as last above; also that the question is leading.

A. I don't think there was, but I would not be positive in regard to that. That is my recollection.

20 Q. State whether or not the corporation ever engaged in business.

13 Objected to for reasons last stated—viz., immaterial, irrelevant, and incompetent and not the best evidence.

A. They did not engage in any business; never were in business; did not have any, to my knowledge.

21 Q. Do you know what became of the deed that was left with Mr. Smythe?

A. I do not.

22 Q. Can you give a description of this land?

A. No, sir.

23 Q. Can you identify the land in any way?

A. I could not.

24 Q. Do you know where the land is? If so, state.

A. Well, the land, I suppose, lies north of the city, in what is called Saratoga precinct. That is where I always understood it to be.

25 Q. Do you know who live- on the land at that time?

A. I think Mr. Smiley was living on the land at that time.

26 Q. Was there ever more than one deed executed by Mr. Smiley?

A. Not that I know of; no, sir.

27 Q. In case the conditions upon which the deed was left with Mr. Smythe were not performed, what was the agreement, if any, relating to the disposition of the deed?

Objected to by counsel for defendant as leading, hypothetical, immaterial, irrelevant, and also for the reason that it is attempting to engraft a trust by parol upon a written instrument.

A. The land was to revert back to Mr. Smiley.

Cross-examination by Mr. CONNELL:

1 Q. What position or office did Mr. Smiley hold in the company?

A. He was general manager.

2 Q. What position or office did Colonel Smythe hold in
14 the company?

A. Secretary and treasurer.

3 Q. You were the president?

A. I was the president.

4 Q. Your company, then, was fully organized?

Objected to by counsel for plaintiff for the reason that the question calls for the conclusion of the witness and question of law.

5 Q. You had an election of officers, did you not, after your articles of incorporation were prepared and filed?

A. I suppose we must have had.

6 Q. Are you quite certain that you did not engage in any business?

A. Not to my knowledge.

7 Q. You say that Mr. Smiley was the general manager. Isn't it true that he purchased for the company fence posts and fencing for the purpose of enclosing the proposed stock yards?

A. He may have done it. I do not know anything in regard to it.

8 Q. Did you hear of it at the time?

A. I may have heard of it. If I did it has entirely gone from my recollection.

9 Q. Don't you remember of the railroad company unloading several car-loads of fence posts and fencing that he had secured through the money advanced to him by Mr. Lay?

A. I never knew that Mr. Lay advanced him any money.

10 Q. Don't you know he had in some way secured a lot of fence posts and fencing?

A. I knew there was a lot of fence posts came there.

11 Q. Assigned to the company?

A. I don't know whether they were assigned to the company or John A. Smiley.

12 Q. But they came, as you understood, for the purpose of fencing these proposed stock yards?

A. Of course, I supposed they were for that purpose.

13 Q. Then the company did engage in business to the extent of procuring through its manager fencing. Isn't that true?

A. I suppose that they did.

H. K. SMITH.

I, W. N. Williams, notary public, do hereby certify that Henry K. Smith was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the deposition by him subscribed as above set forth was stenographically taken by consent and reduced to writing by B. C. Wakeley, who is not interested in the suit, in my presence and in the presence of the witness, and was subscribed by the said witness in my presence, and was taken at the time and place in the annexed notice specified; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

In testimony whereof I have hereunto set my seal and signature this 17th day of May, 1887.

[SEAL.] W. N. WILLIAMS,
Notary Public.

Costs.

Writing deposition	$3 00
Swearing witness	10
	$3 10

Said deposition was enclosed in a sealed envelope and endorsed as follows, to wit:

John A. Smiley *vs.* William J. Connell. Deposition in said action on behalf of plaintiff. This deposition taken, sealed up, endorsed, addressed, and transmitted by me. W. N. Williams, notary public. To the clerk of the district court of Douglas county,
16 Nebaska, Omaha, Nebraska. Filed May 17th, 1887. Wm. H. Ijams, clerk. Opened at request of defendant Connell, Aug. 25, 1887. Wm. H. Ijams, clerk.

Afterwards and on the 11th day of June, 1887, a motion for default was filed herein as follows, to wit:

In District Court, Douglas County, State of Nebraska.

JOHN A. SMILEY
vs.
WILLIAM J. CONNELL.

The plaintiff moves the court to enter an order of default against the defendant and judgment on the pleadings herein.

SAVAGE, MORRIS AND DAVIS,
Att'ys for Pl'ff.

Afterwards, at the May term of said court and on the 18th day of June, 1887, leave to answer was entered herein as follows, to wit:

JOHN A. SMILEY
vs.
WM. J. CONNELL. } Motion.

On motion, defendant has leave to answer herein within twenty days.

Afterwards and on the 18th day of June, 1887, a motion was filed herein as follows, to wit:

In District Court, Douglas County, State of Nebraska.

JOHN A. SMILEY
vs.
WM. J. CONNELL. } Motion of Herbert M. Tenny to be Made Party Defendant.

And now comes Herbert M. Tenny and hereby represents that he has and at the time of the commencement of this action did have an interest in the property in controversy herein, and he therefore asks to be made a party defendant, and so allowed to file an
17 answer herein and defend his said interest.

HERBERT M. TENNY,
By W. J. CONNELL, *His Att'y.*

Afterwards, at the term last aforesaid and on the 18th day of June, 1887, an order was entered herein as follows, to wit:

JOHN A. SMILEY
vs.
WM. J. CONNELL. } Motion.

On motion and for good cause shown, it is ordered that F. H. Lay be, and he hereby is, made a party defendant in this action and is allowed to file an answer herein within twenty days.

Afterwards and on the 7th day of July, 1887, an answer of defendant Connell was filed herein as follows, to wit:

In District Court, Douglas County, State of Nebraska.

JOHN A. SMILEY, Plaintiff,
vs.
WILLIAM J. CONNELL *et al.*, Defendants. } Answer.

And now comes said William J. Connell, one of the defendants in the above-entitled action, and, answering the petition of said plaintiff filed herein, admits that the said plaintiff in the year 1884 and for some time prior thereto was the owner of the real estate described in said petition, but denies that said plaintiff is now the owner of said real estate since about the month of September, 1884, and denies that said plaintiff has been in the actual possession and occupancy of said real estate for more than fifteen years; and said defendant, further answering said petition, admits that in the year 1884 a corporation was organized, under the laws of the State of Nebraska, under the name of "Union Stock Yards Company," and that a deed was duly signed and acknowledged by said John A. Smiley and Anna M. J. Smiley, his wife, wherein said corporation was named as grantee of said land, but said defendant denies that said deed was delivered to one E. F. Smythe, as attorney for said John
18 A. Smiley, to be held by said Smythe as such attorney until the said corporation should deliver to said Smiley stock in said corporation to the amount of $28,000.00 or to any other amount; and said defendant further denies that said deed was never delivered to said corporation or was never intended to be delivered, except upon the conditions specified in said petition, or that said deed was delivered subject to any condition or conditions whatever, but, on the contrary, charges that said deed was executed and delivered for the purpose of absolutely and immediately conveying the title to said real estate to said Union Stock Yards Co., of which corporation the said John A. Smiley was the general manager, and said deed was immediately delivered to said corporation and was duly recorded, with the knowledge of said John A. Smiley, in the office of county clerk of said Douglas county on the 20th day of February, 1885.

And said defendant, further answering said petition, says he has no knowledge of the consideration paid by said Union Stock Yards Co. to said Smiley for said real estate except as shown and stated by said deed, which appears to have been the sum of $28,000.00, and he therefore denies the allegation of said petition that no other

consideration than the agreement to deliver stock was ever paid, and denies that no stock of said corporation was ever delivered or offered, so saith plaintiff, and said defendant denies that the stock of said corporation was not subscribed for in amounts sufficient to enable said corporation to become fully organized, and denies that said corporation never engaged in business or that it was abandoned by the proprietors thereof.

And said defendant, further answering said petition, admits that on the 13th day of February, A. D. 1879, one Frederick H. Lay recovered against the said "Union Stock Yards of Nebraska"
19 a judgment in this court for the sum of $1,398.00 and costs in an action there pending, wherein said Lay was plaintiff and said "The Union Stock Yards of Nebraska" was defendant, and that thereafter and on the 17th day of August, 1881, an execution was issued on said judgment and levy made thereof on the land hereinbefore described, which was sold by the sheriff of said county to one John I. Redick and the defendant herein and a sheriff's deed executed therefor, which was recorded in the office of the county clerk for said county, and that said Redick thereafter quitclaimed his interest therein to defendant Connell.

And said defendant further saith that prior to commencement of this action a portion of said premises was conveyed by deed to Herbert M. Tenny and F. H. Lay, who now claim to be the owners of the premises so conveyed.

And said defendant further denies that he never paid to said Lay any part of the amount bid by him at said sale or that at any time he knew that said Union Stock Yards Co. had no interest in said land, and he further denies that said plaintiff had no knowledge of said levy, sheriff's sale, or deed.

And said defendant further denies that on the 13th day of March, A. D. 1887, the said Lay in writing assigned said judgment to the plaintiff and executed and delivered to plaintiff a quitclaim deed of said land or in writing otherwise directed said Connell to convey to plaintiff any apparent interest he might have in said land or the proceeds of said execution sale.

And said plaintiff denies that said plaintiff is entitled to any equitable relief whatever in the premises.

W. J. CONNELL.

STATE OF NEBRASKA, } ss:
Douglas County, }

20 W. J. Connell, being duly sworn, says he is the defendant named in the foregoing answer; that he knows the contents of said answer and believes the facts therein stated to be true.

W. J. CONNELL.

Subscribed in my presence and sworn to before me this 7th day of July, 1887.

WM. H. IJAMS, *Clerk,*
By V. M. MACKEY, *Deputy.*

Afterwards and on the 7th day of July, 1887, a petition and bond of defendants Tenny and Lay for removal to the circuit court of the United States were filed herein as follows, to wit:

In District Court, Douglas County, State of Nebraska.

JOHN A. SMILEY, Plaintiff,
vs.
WILLIAM J. CONNELL *et al.*, Defendants. } Petition for Removal.

Your petitioners, Frederick H. Lay and Herbert M. Tenny, defendants in the above-entitled suit, respectfully shows to the court that at this time and at the commencement of this action and for a long time prior thereto the said Frederick H. Lay was and is a citizen of the State of Colorado, and the said Herbert M. Tenny was and is a citizen of the State of Ohio.

Your petitioners further show that the said John A. Smiley, plaintiff, is a citizen of the State of Nebraska, and at the time of the commencement of said suit was a citizen of the State of Nebraska, and further say that the amount in dispute in said action exceeds the sum of 12,000.00, exclusive of costs, and in fact exceeds the sum of $10,000.00, exclusive of costs, and that each of said parties own and claim separate and distinct portions of said land.

Your petitioners further present to the court their bond in the sum of $300.00 conditioned as by the acts of Congress in said
21 behalf required, with good and sufficient surety, and pray the court to approve said security and accept the same, and that this honorable court proceed no further in the case, but remove the same into the circuit court of the United States for the district of Nebraska at its next session, all as by the acts of Congress provided; and your petitioners will ever pray.

(Signed) FREDERICK H. LAY AND
HERBERT M. TENNY,
By their attorney, W. J. CONNELL.

STATE OF NEBRASKA, } ss:
County of Douglas, }

William J. Connell, being first duly sworn, deposes and says that he is the attorney for the above-named defendants, Frederic H. Lay and Herbert M. Tenny, and that the facts contained in the foregoing petition are true.

W. J. CONNELL.

Subscribed in my presence and sworn to before me this 7th day of July, 1887.

WM. H. IJAMS, *Clerk*,
By V. M. MACKEY, *Deputy*.

Bond.

Know all men by these presents that we, Frederick H. Lay and Herbert M. Tenny, as principal-, and Payson M. Chadwick, as surety,

are held and firmly bound unto John A. Smiley in the penal sum of three hundred dollars; for the payment of which sum, well and truly to be made, said Frederick H. Lay and Herbert M. Tenny bind themselves and their assigns and said surety binds *their* heirs, administrators, and assigns firmly by these presents.

Dated Omaha, Nebraska, July 7th, 1887.

22 The condition of the above bond are such that whereas the said Frederick H. Lay and Herbert M. Tenny filed their petition in the district court for Douglas county, Nebraska, in a cause wherein said Frederick H. Lay and Herbert M. Tenny and W. J. Connell are defendants and said John A. Smiley is plaintiff, praying that said case be removed into the circuit court of the United States for the district of Nebraska, at its session next to be held, as by the acts of Congress in such cases made and provided, and desires to give the securing by the said acts required in said behalf:

Now, if the said Frederick H. Lay and Herbert M. Tenny shall enter in said circuit court on the first day of its next session a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court if said circuit court shall hold that this suit was wrongfully or improperly removed thereto, and shall appear in said circuit court and enter special bail herein, all as by the acts of Congress required, and do all other things by said acts required in said behalf, then this obligation to be null and void; otherwise to remain in full force and effect.

FREDERICK H. LAY AND
HERBERT M. TENNY,
By their attorneys, W. J. CONNELL,
Principal.
O. M. CHADWICK, *Surety.*

Afterwards, at the May term of said court and on the 28th day of August, 1887, an order for removal was entered herein as follows, to wit:

JOHN A. SMILEY
vs.
WM. J. CONNELL *et al.*

Order of Removal to U. S. Circuit Court.

23 On the pleadings and proceedings herein and on the bond filed by the defendants Frederick H. Lay and Herbert M. Tenny under the provisions of an act of the Congress of the United States, passed March 3rd, 1887, entitled "An act to amend an act of Congress approved March 3rd, 1875, entitled An act to determine the jurisdiction of the circuit court of the United States and to regulate the removal of causes from State courts, and for other purposes," it is hereby ordered that the security offered by the said defendants be approved, and that this court proceed no further in this cause, and that this cause be removed into the circuit court of the United States for the district of Nebraska, and by

consent of parties the said cause is removed as to said defendant Connell as well as to the other defendants.

THE STATE OF NEBRASKA, } ss:
Douglas County, }

I, Wm. H. Ijams, clerk of the district court in and for Douglas county, Nebraska, do hereby certify that the foregoing is a full and true transcript of the proceedings in the case of John A. Smiley against William J. Connell *et al.* and all thereof appearing of record in said court.

Witness my signature and the seal of said court, at the city of Omaha, this 25th day of October, A. D. 1887.

WM. H. IJAMS, *Clerk.*

Plaintiff's Costs.

Clerk Ijams	$6 78
Pl'ff paid $2.50.	
Sh'ff Coburn	85
P'f by pl'ff.	
Pl'ff's deposition	5 60
	$13 23

Defendant's Co-ts.

Clerk's, Ijams, original costs	$7 30
" " this transcript	13 25
	$20 55

Upon the back of said transcript appear endorsements in
24 words and figures following, to wit:

No. 116, M. U. S. circuit court, district of Nebraska. John A. Smiley *vs.* Wm. J. Connell, Frederick H. Lay, and Herbert M. Tenny. Certified transcript and removal from dist. court of Douglas county, Nebr. Filed Nov. 12, 1887. Elmer D. Frank, clerk. W. J. Connell, att'y.

Thereupon, afterwards, to wit, on the 19th day of November, 1887, petition for leave to file amended and supplemental bill was filed in said case; which said petition is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JOHN A. SMILEY, Complainant,
vs.
WILLIAM J. CONNELL, HERBERT M. TENNEY, and FREDERICK H. LAY, Defendants. } Petition.

To the honorable judges of the circuit court of the United States for the district of Nebraska:

The humble petition of the plaintiff, John A. Smiley, showeth—

That your petitioner, resident of the city of Omaha, Nebraska, and a citizen of the State of Nebraska, on the 16th day of March, A. D. 1887, as of the May, 1887, term of the district court of the county of Douglas, State of Nebraska, exhibited his original bill of complaint in said district court against William J. Connell, resident of the city of Omaha and a citizen of the State of Nebraska, thereby praying that the bill of your orator in and to the west half of the southeast quarter of section three, in township fifteen,
25 range thirteen east, of the 6th principal meridian, according to the survey of the Government of the United States, be quieted in your petitioner, free from any claims of said defendant, and that a cloud upon the title of your petitioner to said premises be removed by the decree of said court; that said defendant appeared and put in his answer to said original bill, as by the said bill and answer now being of record in this court, reference thereto being had, will appear.

That since the filing of said bill the defendants Herbert M. Tenney, citizen of the State of Ohio, whose residence is unknown to your petitioner, and Frederick H. Lay, resident of the city of Pueblo, Colorado, and a citizen of the State of Colorado, applied to the said district court to be made parties defendant in said suit, and on the 18th day of June, 1887, at the regular May term of said court, the said Tenney and Lay were by order of said court admitted as defendants in said suit with leave to answer therein.

That on the 7th day of July, 1887, during the May, 1887, term of said district court, the said defendants Lay and Tenney each filed in said court his several petition, together with a bond, for the removal of said suit to the circuit court of the United States for the district of Nebraska, as will more fully appear by the said petitions and bonds, the same being of record herein.

That after the commencement of this suit the defendant W. J. Connell has executed and caused to be recorded in the office of the county clerk of the county of Douglas, State of Nebraska, two deeds purporting to convey to each of said other defendants a portion of said above-described real estate, which deeds bear a date previous to the commencement of this suit.

That on the 7th day of July, A. D. 1887, the defendant
26 Frederick H. Lay, by his attorney, the defendant Connell, commenced in this court an action in ejectment against your petitioner to recover possession of the tract of land conveyed as

aforesaid to him by the said Connell, described as follows, to wit: Beginning thirty-nine rods north of the southwest corner of the southeast quarter of section three, township fifteen, range thirteen east, 6th P. M., and running thence east sixty rods, thence north twenty-nine rods, thence west sixty rods, thence south twenty-nine rods to the place of beginning; also the north half of the northwest quarter of the southeast quarter of said section.

That on the 7th day of July, 1887, the defendant Herbert M. Tenney, by his attorney, the defendant Connell, commenced in this court an action in ejectment against your petitioner to recover the tract of land conveyed to him by the said defendant, Connell, described as follows, viz: Beginning ten rods north of the southwest corner of the southeast quarter of section three, township fifteen, range thirteen east, 6th P. M., and running thence east sixty rods; thence north twenty-nine rods; thence west sixty rods, and thence south twenty-nine rods to the place of beginning.

That on the 7th day of July, 1887, the defendant William J. Connell commenced in the district court of the county of Douglas, State of Nebraska, an action in ejectment against this plaintiff to recover possession of the portion of land described in the petitioner's original bill, which said portion is described as follows, to wit: Beginning at the southwest corner of the southeast quarter of section three, township fifteen, range thirteen east, 6th P. M., running thence east eighty rods; thence north sixty-eight rods; thence west twenty rods; thence south fifty-eight rods; thence west sixty rods; thence south ten rods to place of beginning. That all said
27 actions at law are still pending.

That your petitioner is advised that the said Herbert M. Tenney and Frederick H. Lay ought to be made parties to the said bill by way of amendment, and

That your petitioner ought, by way of supplement to his said bill, to show to your honors the several matters and things hereinbefore mentioned occurring since the filing of the petitioner's said original bill.

Wherefore your petitioner asks that he may be allowed to file an amended and supplemental bill herein, adding the defendants Herbert M. Tenney and Frederick H. Lay as defendants, with apt words to charge them and setting up the several matters and things hereinbefore mentioned, with leave to apply for such relief as may be proper and equitable.

SAVAGE, MORRIS & DAVIS,
Solicitors for Jno. A. Smiley.

Upon the back of said petition appear endorsements in words and figures following, to wit:

No. 116, docket M. In circuit court, district of Nebraska. John A. Smiley *vs.* Wm. J. Connell *et al.* Petition for leave to file amended and supplemental bill. Filed Nov. 19, 1887. Elmer D. Frank, clerk. Savage, Morris & Davis, pl'ff's sol's.

Thereupon, afterwards, at the November term of said court, on the 19th day of November, 1887, the following proceedings were had

and done in said cause, as appears of record on folio 464, Journal "M" of said court, to wit:

JOHN A. SMILEY
vs.
WILLIAM J. CONNELL *et al.* } 116, M.

On motion of complainant, by Savage, Morris & Davis, his
28 solicitors, leave is granted him by the court to file supplemental bill of complaint herein by December rules.

Thereupon, afterwards, to wit, on the 29th day of November, 1887, supplemental and amended bill was filed in said case; which said bill is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JOHN A. SMILEY, Complainant,
vs.
WILLIAM J. CONNELL, HERBERT M. TENNY, and FREDERICK H. LAY, Defendants.

To the honorable judges of the circuit court of the United States for the district of Nebraska:

John A. Smiley, of Omaha and a citizen of the State of Nebraska, brings this his supplemental and amended bill against William J. Connell, of Omaha and a citizen of the State of Nebraska; Herbert M. Tenney, whose residence is to your orator unknown, citizen of the State of Ohio, and Frederick H. Lay, of Pueblo, citizen of the State of Colorado; and thereupon your orator complains and says that he is and for more than fifteen years immediately before the bringing of this suit has been the owner and in the actual possession of the following-described real estate in the county of Douglas, State of Nebraska, to wit, the west half of the southeast quarter of section three, in township fifteen, range thirteen east, of the sixth principal meridian; and during all of said time has resided thereon with his family.

Further, your orator showeth that in the year 1874 a corporation was attempted to be organized under the laws of the State of
29 Nebraska by a number of persons who adopted and signed articles of incorporation under the name of the Union Stock Yards of Nebraska and caused the same to be recorded in the office of the county clerk of said county; but your orator shows that the capital stock of said corporation was not subscribed for in amounts sufficient to enable it to become fully organized for the transaction of business.

Further, your orator showeth that in the year 1874 negotiations were had between the projectors of said corporation and your orator for the purchase by said corporation of the land hereinbefore described, and as a part of said negotiations the complainant signed a deed of said land wherein the said Union Stock Yards Company

was named as grantee, and said deed was delivered to one E. F. Smythe as attorney for your orator, to be held by the said Smythe until said corporation should comply with the terms of said proposed purchase and until the said corporation should become fully organized and ready to engage in business and until its capital stock should be fully subscribed for. The agreed consideration to be paid for said proposed conveyance was stock in said corporation to the amount of twenty-eight thousand dollars, to be delivered when the remainder of the stock was subscribed.

And, further, your orator shows that the said corporation never complied with the terms so agreed upon and never delivered or offered to deliver to your orator any portion of said stock, and that the further organization of said corporation was abandoned by the projectors of said corporation and it did not engage in business.

That notwithstanding the said facts the said Smythe, on February 20th, 1875, without any authority, consent, or knowledge of your orator, caused said deed to be filed and recorded in the
30 office of the county clerk of said county.

That on the 13th day of February, 1879, the defendant Frederick H. Lay obtained a judgment against the said Union Stock Yards of Nebraska in the district court in the county of Douglas, State of Nebraska, for the sum of thirteen hundred and ninety-eight dollars and costs, in an action there pending wherein the said Frederick H. Lay was plaintiff and the said Union Stock Yards Company of Nebraska was defendant. In said suit the defendant Connell and his law partner, one John I. Redick, were the attorneys of said Lay and personally managed the same on behalf of the said Lay; that thereafter, on the 17th day of August, 1881, an execution was issued on said judgment and levy thereof made on the said lands of your orator and a portion thereof was sold by the sheriff to the defendant Connell and the said John I. Redick and a deed was executed by the said sheriff to the said Redick and Connell and by them caused to be recorded in the office of the county clerk of the said county of Douglas; that the said Redick thereafter executed a quitclaim deed of his interest in said land to the said Connell. The portion of your orator's said land so attempted to be sold on said execution is described as follows: Commencing at the southwest corner of the southeast quarter of section three, in township fifteen, range thirteen east, of the 6th principal meridian, and running thence east eighty rods; thence north ten rods; thence west eighty rods; thence south ten rods to the place of beginning; also the parcel of land described as follows: Commencing ten rods north of the southeast corner of the southwest quarter of the southeast quarter of said section three, township fifteen, range thirteen, and thence running north fifty-eight rods; thence west twenty
31 rods; thence south fifty-eight rods; thence east twenty rods to the place of beginning.

And further your orator shows that the only consideration for said sale on said execution was a credit on said judgment and the price for which the same was so sold by the said sheriff was not paid to him or into court.

Your orator further shows that thereafter another execution was issued on said judgment, and, after several appraisals and fruitless attempts to sell the same, such proceedings were had that another portion of your orator's said land was offered for sale by said sheriff, and was, on the 6th day of September, 1884, struck off and sold by the said sheriff to the defendant Connell, said last portion of land being described as follows: Beginning at a point ten rods north of the southwest corner of the southeast quarter of section three, in township fifteen, range thirteen east, of the 6th principal meridian, running thence east sixty rods; thence north fifty-eight rods; thence west sixty rods; thence south fifty-eight rods to the place of beginning. That no portion of the amount bid by said Connell was paid by him either to said sheriff or into court, and the only consideration for said sale was a credit on said judgment for the amount so bid by said Connell. The sheriff reported the said sale to the said court, which approved the same and ordered the sheriff to execute a deed therefor to the said Connell. The sheriff thereupon executed a deed for said land to the defendant Connell, who caused the same to be recorded. The defendant Connell had no permission or authority from the said Lay to make either of said bids in his own behalf or in behalf of the said Redick. Prior to the commencement of this suit the defendant Connell did not account to the defendant Lay for any portion of the amounts so bid by him for said
32 parcels of land, but suffered his said client to remain ignorant of said proceedings. During the time of said proceedings your orator was not informed and did not know that the deed so placed in the hands of the said Smythe as an escrow had been recorded, and was ignorant of said sales by the sheriff on executions.

Further your orator showeth that upon discovering that said deed signed by your orator had been placed upon record he demanded of the officers of the said Union Stock Yards of Nebraska a quitclaim deed of said land, that the same might be recorded, and accordingly on the 10th day of September, 1885, the officers of said company executed a deed of said land to your orator.

Further your orator showeth unto your honors that on the 12th day of March, 1887, the defendant Frederick H. Lay, in writing, assigned said judgment to your orator for the consideration of fifteen hundred dollars and executed to your orator a quitclaim deed for all of said land, and in writing directed his said attorney, the defendant Connell, to convey to your orator any apparent interest acquired by reason of said execution sales.

And your orator, being advised that the records of said sheriff's deeds cast a cloud upon the title of your orator to said land, by himself and his agents represented the same to the defendant Connell and requested him to execute a quitclaim deed of said land to your orator and offered to pay to the said defendant any reasonable amount due him for his services in said litigation and said proceedings for the collections of said judgment, and all his costs and expenses in that behalf incurred.

On the 16th day of March, 1887, as of the May, 1887, term, your

orator exhibited his original bill of complaint against the
33 defendant William J. Connell in the district court of the State of Nebraska for the county of Douglas, thereby praying that the title of your orator in said premises be quieted in him and the cloud so cast on the title of your orator to said premises be removed, as by said bill, the same being of record herein, reference thereto being had, will more fully appear.

Further your orator showeth that the said Connell appeared and put in his answer to said bill.

Further your orator showeth that after the filing of your orator's said bill the defendant Connell signed and acknowledged two deeds purporting to convey to each of said defendants Lay and Tenney a portion of your orator's said land, and caused the said deeds to be recorded in the office of the county clerk of said county. Said deeds bear a date previous to the filing of your orator's said bill.

Thereafter the defendants Tenney and Lay, by their attorney, the defendant Connell, applied to said district court to be admitted as defendants in this suit, and on the eighteenth day of June, 1887, of said May term, were by said court admitted as defendants. On the 7th day of July, 1887, the defendants Lay and Tenney each filed in said court his petition for the removal of this suit to this court, together with a bond, as directed by statute, and thereupon this suit was removed to this court.

And further your orator showeth that since the filing of said original bill the defendant Lay, by his attorney, the defendant Connell, hath caused an action of ejectment to be commenced in this court to turn your orator out of the possession of the tract of land conveyed to him by said Connell, described as follows, to wit:

Beginning thirty-nine rods north of the southwest corner of
34 the southeast quarter of section three (3), township fifteen (15), range thirteen (13) east, of the 6th P. M., running thence east sixty rods, thence north 29 rods, thence west 60 rods, thence south 29 rods to the place of beginning; also the north half of the northwest quarter of the southeast quarter of said section.

Further your orator showeth that on the 7th day of July, 1887, the defendant Herbert M. Tenney, by his attorney, the defendant Connell, commenced in this court an action of ejectment against your orator to obtain possession of the tract of land conveyed to the said Tenney by the defendant Connell, described as follows, to wit: Beginning ten rods north of the southwest corner of the southeast quarter of said section, running thence east 60 rods, thence north 29 rods, thence west 60 rods, thence south 29 rods to the place of beginning.

And further your orator showeth that on the 7th day of July, 1887, the defendant Connell commenced in the district court of the county of Douglas and State of Nebraska an action of ejectment against your orator to obtain possession of the portion of land described in your orator's original bill; which said portion is described as follows, to wit: Beginning at the southwest corner of the southeast quarter of said section three (3), running thence east 80 rods, thence north 68 rods, thence west 20 rods, thence south 58 rods,

thence west 60 rods, thence south 10 rods to the place of beginning.

Your orator further showeth that all of said actions are still pending.

Your orator being advised that the said defendants cannot support such actions, and that your orator is entitled to have said sheriff's deeds and said deeds from the defendant Connell to the defendants Lay and Tenney cancelled and declared void and
35 said cloud on your orator's title removed and to have the matters in controversy adjudicated and determined in this suit, by which the said district court and this court obtained jurisdiction of the controversies before the commencement of said actions of ejectment, and that your orator ought not to be subjected to the annoyance and expense of defending said several actions of ejectment, he has several times applied to the defendants to desist from proceeding in said actions, and he was in hopes said defendants would comply with your orator's fair and reasonable request, as in justice and equity they ought to do; but now, so it is, may it please your honors, that the said defendants, William J. Connell, Herbert M. Tenney, and Frederick H. Lay, combining and confederating together with divers persons at present unknown to your orator, whose names, when discovered, your orator prays he may be at liberty to insert, with apt words to charge them as parties hereto, and contriving how to wrong and injure your orator in the premises, and to put your orator to the expense and annoyance of defending numerous actions at law, and to further confuse the records of your orator's title to said land, absolutely refuse to comply with your orator's said request and insist upon proceeding in said actions to turn your orator out of possession of said land, to the manifest injury of your orator in the premises.

To the end, therefore, that the defendants may full, true, and perfect answer make to all and singular the premises as fully in every respect as if the same were here again repeated and they thereunto particularly interrogated, according to the best of their respective knowledge, information, and belief (but not under oath, oath to said answers being hereby expressly waived), and that the cloud cast upon your orator's title to said land by reason of
36 the said sheriff's deeds and the deeds hereinbefore mentioned from the defendant Connell to the defendants Lay and Tenney and by said records be removed and the said deeds declared null and void to convey any estate to the said defendants or their privies, and that the title of your orator in said land be quieted in him, free from any claim, interest, or estate of the defendants or either of them or the privies of any of them; and that the said defendants and each of them may be restrained, by the injunction of this honorable court, from proceeding in said actions of ejectment and from commencing any other action or proceeding at law to turn your orator out of possession of said land; and that your orator may be further relieved in the premises according to equity and good conscience:

May it please your honors to grant unto your orator not only the

most gracious writ or writs of injunction of the United States of America, issuing out of and under the seal of this honorable court, to be directed to said defendants, William J. Connell, Herbert M. Tenney, and Frederick H. Lay, to restrain them and each of them from proceeding at law against your orator touching any of the matters in question, but also the most gracious writ of subpœna of the United States of America, to be directed to the said William J. Connell, Herbert M. Tenney, and Frederick H. Lay, thereby commanding them and each of them, at a certain day and under a certain penalty therein to be specified, personally to be and appear before your honors in this court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet, and your orator will ever pray.

SAVAGE, MORRIS & DAVIS,
Solicitors for Complainant.

J. M. WOOLWORTH, *Of Counsel.*

37 UNITED STATES OF AMERICA, }
District of Nebraska, } ss:

John A. Smiley, being duly sworn, on his oath deposeth and saith that he is the complainant in the foregoing amended and supplemental bill of complaint; that he knows the contents and statements thereof; that the matters and things therein stated are true.

——— ———.

Subscribed and sworn to before me this — day of ———, 1887.

——— ———.

Upon the back of said supplemental bill appear endorsements in words and figures following, to wit:

No. 116, doc. M. John A. Smiley, comp'ts, *vs.* William J. Connell, Herbert M. Tenney, and Frederick H. Lay, def'ts. Supplemental and amended bill. Filed Nov. 29, 1887. Elmer D. Frank, clerk. Savage, Morris and Davis, solicitors for compl'ts.

Thereupon, afterwards, to wit, at the January term of said court, on the 6th day of January, 1888, the following proceedings were had and done in said cause, as appears of record on folio 582, Journal "M" of said court, to wit:

JOHN A. SMILEY
vs. } 116, M.
WILLIAM J. CONNELL *et al.*

On motion of defendant-, by W. J. Connell, solicitor, leave is granted by the court to answer the amended bill herein in twenty days from this date, and complainant is ruled to reply in forty days.

Thereupon, afterwards, to wit, on the 15th day of February, 1888, answer of defendant Tenney was filed in said case; which said answer is in words and figures following, to wit:

38 In the United States Circuit Court in and for the District of Nebraska.

JOHN A. SMILEY, Complainant,
vs.
WILLIAM J. CONNELL and HERBERT M. TENNEY and F. H. LAY, Defendants.

Answer of Defendant Tenney.

The Answer of Herbert M. Tenney, One of the Defendants, to the Amended Bill of Complaint of John A. Smiley, Complainant.

This defendant, now and at all times hereafter, saving and reserving unto himself all benefit and advantage of exceptions which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for answer thereto or unto so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, this defendant, answering, saith—

That the citizenship of the several parties, plaintiff and defendants, is as alleged and set forth in said bill of complaint.

And said defendant, further answering, admits that in the year 1874 and for some years prior thereto the said plaintiff was the owner of the real estate described in said petition; but said defendant denies that said plaintiff is now the owner of said real estate, or that said plaintiff for more than fifteen years immediately before the bringing of this suit has been the owner and in the actual possession of said real estate.

And said defendant, further answering said bill of complaint, admits that in the year 1874 a corporation was attempted to be organized and, as this defendant charges, was fully and com-

39 pletely organized under the name of the Union Stock Yards of Nebraska; and this defendant admits that the articles of incorporation of said Union Stock Yards of Nebraska were duly adopted, signed, and recorded, as set forth in said bill of complaint; but said defendant denies that the capital stock of said corporation was not subscribed for in amounts sufficient to enable it to become fully organized for the transaction of business.

And said defendant, further answering said bill of complaint, admits that in the year 1874 negotiations were had between the projectors of said corporation, and, as defendant charges, for and on behalf of said corporation, and the said plaintiff for the purchase by said corporation of the land described in said bill of complaint, and that said plaintiff signed a deed of said land to said corporation, which deed this defendant alleges was duly acknowledged by said plaintiff and was duly signed and acknowledged by the wife of said plaintiff.

The said defendant, further answering said bill of complaint, denies that said deed was delivered to one E. F. Smythe, as attorney for said plaintiff, to be held until said corporation should comply with any terms of purchase or until its capital stock should fully be subscribed for or until the happening of any other event or the doing of any other thing; but, on the contrary, this defendant charges

that said deed was executed and delivered for the purpose of absolutely and immediately transferring and conveying said real estate to said Union Stock Yards of Nebraska, and enabling the said corporation to have and obtain credit and to furnish the necessary and required yards for stock purposes, the said plaintiff having been one of the chief organizers of said corporation and then
40 being one of the incorporators thereof and its general manager.

And this defendant denies that said Smythe, without any authority, consent, or knowledge of said plaintiff, caused said deed to be filed and recorded; but, on the contrary, this defendant charges that on said 20th day of February, 1875, the said deed was duly filed in the office of the county clerk of said Douglas county with the knowledge and by the authority of said plaintiff, who was then the general manager of said corporation as aforesaid, for the express purpose of having the title shown of record to be in said corporation in order to enable said plaintiff as such general manager to carry forward the purpose of the organization of said corporation and to enable him to make purchase for said corporation and obtain credit for and on behalf of said corporation.

And said defendant, further answering said bill of complaint, admits that the consideration to be paid for said conveyance of said land was stock in said corporation to the amount of $28,000.00, but said defendant denies that said corporation never complied with the terms agreed upon and never delivered or offered to deliver to said plaintiff any portion of said stock, and said defendant denies that the organization of said corporation was abandoned by the projectors of said corporation or that it did not engage in business, but, on the contrary, this defendant charges that said corporation was fully organized and officers were duly elected, of which plaintiff was one, as hereinbefore stated, and business was transacted by said officers, especially by said plaintiff, for and on behalf of said corporation, and a large amount of stock was issued to said plaintiff and others, the amount issued to said plaintiff, as this defendant is informed and believes, being the full amount of the consideration named in said deed, to wit, the sum of $28,000.00.

41 This defendant, further answering said bill of complaint, admits that on the 13th day of February, 1879, the defendant Frederick Lay obtained a judgment against the said Union Stock Yards Company of Nebraska, in the district court in and for the county of Douglas, State of Nebraska, for the sum of $1,398.00 and costs, in a certain action then pending in said court wherein the said Frederick H. Lay was plaintiff and the said Union Stock Yards of Nebraska was defendant, and that in said suit said defendant Connell and his then law partner, John I. Redick, were the attorneys for said Lay and personally managed the same on behalf of said Lay.

And this defendant admits that thereafter, to wit, on or about the 17th day of August, 1881, an execution was issued on said judgment and levy thereof made on a portion of said land, and a portion thereof, as described in said bill of complaint, was sold by the

sheriff of said Douglas county to said defendant Connell and said Redick, and a deed was executed by said sheriff to said purchasers, and that subsequently said Redick conveyed his undivided half interest in said portion of said land to said defendant Connell, and that said deed- executed by said Redick and said sheriff were both duly recorded in the office of the clerk of said Douglas county.

And this defendant, further answering said bill of complaint, admits that thereafter another execution was issued on said judgment, and, after several appraisals and fruitless attempts to sell, such proceeding- were had that another portion of said land was offered for sale by said sheriff, and on or about the 6th day of September, 1884, was struck off and sold by said sheriff to said defendant
42 Connell, said last portion of said land being as described in said bill of complaint as having been sold at the date last aforesaid.

And this defendant admits that the said sheriff reported said sale to said district court of Douglas county, and that said court duly approved the same and ordered said sheriff to execute a deed therefor to said defendant Connell, and said sheriff thereupon executed a deed for said land to said defendant Connell, who caused the same to be duly recorded.

And this defendant, further answering said bill of complaint, denies that said defendant Connell had no permission and authority from the said Lay to make either of said bids in his own behalf or in behalf of said Redick, and this defendant also denies that prior to the commencement of this suit said defendant Connell did not account to said defendant Lay for any portion of the amounts so bid by him for said parcels of land, and denies that he suffered said Lay to remain ignorant of said proceedings, and this defendant denies that the only consideration for said sales so as aforesaid made by said sheriff was credits on the judgment for the amounts bid at said sales.

This defendant, further answering said bill of complaint, denies that at the time — said proceedings the said plaintiff was not informed and did not know *of* the recording of the deed executed by him to said corporation had not been recorded or was ignorant of said sales by said sheriff on execution.

And this defendant denies that upon discovering said deed had been placed on record the said plaintiff demanded of the officers of said corporation a deed of said land, but, on the contrary, the said plaintiff well knew at the time said deed was recorded, as hereinbefore alleged, that the same was so recorded, and he so
43 represented to said defendant Lay, and upon the strength of such representations he obtained from said Lay the sum of $1,000.00 in cash for the use and benefit of said corporation, the same being the cause of action, with interest, upon which said Lay obtained judgment against said corporation for said sum of $1,398.00 and costs.

The defendant, further answering said bill of complaint, denies that on the 12th day of March, 1887, or at any other time the said defendant Lay assigned said judgment for the consideration of

$1,500.00 or any other sum to said plaintiff and executed to him a deed for said land or directed said defendant Connell in writing or otherwise to convey to said plaintiff any interest acquired by reason of said execution sales.

And this defendant, further answering said bill of complaint, says that any pretended purchase of said judgment from said defendant Lay was at a time when said defendant Connell was the owner thereof by assignment, and was with full knowledge and notice on the part of said plaintiff of such ownership and assignment and of the rights of said defendant Connell in the premises, and was with full and actual as well as constructive notice that said defendant Connell was the owner of said real estate.

This defendant, further answering said bill of complaint, admits that said defendant Connell by deed to this defendant and to said defendant Lay conveyed the portions of said land in said bill of complaint described as having been so conveyed; but this defendant denies that said deeds were made after the filing of said bill, but, on the contrary, this defendant charges that said deeds were made, executed, and acknowledged on the day which they bear date.

44 And this defendant admits the commencement and pendency of the several suits mentioned in said bill of complaint, but he denies that the plaintiffs therein are not entitled to support and maintain said suits.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged; without this, that there is any other matter, cause, or thing in said complainant's said bill of complaint contained material for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is not true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

HERBERT M. TENNEY, *Defendant*,
Per C.

W. J. CONNELL,
Solicitor for Defendant.

Upon the back of said answer appear endorsements in words and figures following, to wit:

No. 116, M. U. S. circuit court, dist. of Nebr. John A. Smiley *vs.* William J. Connell and Herbert M. Tenney and F. H. Lay. Answer of defendant Tenney. Filed Feb. 15, 1888. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the said 15th day of February, 1888, answer of defendant Connell was filed in said case; which said answer is in words and figures following, to wit:

45 In the United States Circuit Court in and for the District of Nebraska.

JOHN A. SMILEY, Complainant,
vs.
WILLIAM J. CONNELL and HERBERT M. TENNEY and F. H. LAY, Defendants.
} Answer of Defendant Connell.

The Answer of William J. Connell, One of the Defendants, to the Amended Bill of Complaint of John A. Smiley, Complainant.

This defendant, now and at all times hereafter, saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for answer thereto or unto so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, this defendant, answering, saith—

That the citizenship of the several parties, plaintiff and defendants, is as alleged and set forth in said bill of complaint.

And said defendant, further answering, admits that in the year 1874 and for some years prior thereto the said plaintiff was the owner of the real estate described in said petition, but said defendant denies that said plaintiff is now the owner of said real estate or that said plaintiff for more than fifteen years immediately before the bringing of this suit has been the owner and in the actual possession of said real estate.

And said defendant, further answering said bill of complaint, admits that in the year 1874 a corporation was attempted to
46 be organized and, as this defendant charges, was fully and completely organized under the name of the Union Stock Yards of Nebraska, and this defendant admits that the articles of incorporation of said Union Stock Yards of Nebraska were duly adopted, signed, and recorded as set forth in said bill of complaint, but said defendant denies that the capital stock of said corporation was not subscribed for in amounts sufficient to enable it to become fully organized for the transaction of business.

And said defendant, further answering said bill of complaint, admits that in the year 1874 negotiations were had between the projectors of said corporation, and, as defendant charges, for and on behalf of said corporation, and the said plaintiff for the purchase by said corporation of the land described in said bill of complaint, and that said plaintiff signed a deed of said land to said corporation, which deed this defendant alleges was duly acknowledged by said plaintiff and was also duly signed and acknowledged by the wife of said plaintiff.

The said defendant, further answering said bill of complaint, denies that said deed was delivered to one E. F. Smithe, as attorney for said plaintiff, to be held until said corporation should comply with any terms of purchase or until its capital stock should be fully subscribed for or until the *the* happening of any other event or the doing of any other thing; but, on the contrary, this defendant

charges that said deed was executed and delivered for the purpose of absolutely and immediately transferring and conveying said real estate to said Union Stock Yards of Nebraska and enabling the said corporation to have and obtain credit and to furnish the necessary and required yards for stock purposes, the said
47 plaintiff having been one of the chief organizers of said corporation and then being one of the incorporators thereof and its general manager.

And this defendant denies that said Smythe, without any authority, consent, or knowledge of said plaintiff, caused said deed to be filed and recorded; but, on the contrary, this defendant charges that on said 20th day of February, 1875, the said deed was duly filed in the office of the county clerk of said Douglas county, with the knowledge and by the authority of said plaintiff, who was then the general manager of said corporation as aforesaid, for the express purpose of having the title shown of record to be in said corporation, in order to enable said plaintiff, as such general manager, to carry forward the purpose of the organization of said corporation and to enable him to make purchases for said corporation and obtain credit for and on behalf of said corporation.

And said defendant, further answering said bill of complaint, admits that the consideration to be paid for sa-d conveyance of said land was stock in said corporation to the amount of $28,000.00, but said defendant denies that said corporation never complied with the terms agreed upon and never delivered or offered to deliver to said plaintiff any portion of said stock; and said defendant denies that the organization of said corporation was abandoned by the projectors of said corporation or that it did not engage in business, but, on the contrary, this defendant charges that said corporation was fully organized and officers were duly elected, of which plaintiff was one, as hereinbefore stated, and business was transacted by said officers, especially by said plaintiff, for and on behalf
48 of said corporation, and a large amount of stock was issued to said plaintiff and others, the amount issued to said plaintiff, as this defendant is informed and believes, being the full amount of the consideration named in said deed, to wit, the sum of $28,000.00.

This defendant, further answering said bill of complaint, admits that on the 13th day of February, 1879, the defendant Frederick H. Lay obtained a judgment against the said Union Stock Yards Company of Nebraska in the district court in and for the county of Douglas, State of Nebraska, for the sum of $1,398.00 and costs in a certain action then pending in said court wherein the said Frederick H. Lay was plaintiff and the said Union Stock Yards of Nebraska was defendant, and that in said suit this defendant and his then law partner, John I. Redick, were the attorneys for said Lay and personally managed the same on behalf of said Lay.

And this defendant admits that thereafter, to wit, on the or about the 17th day of August, 1881, an execution was issued on said judgment and levy thereof made on a portion of said land, and a portion thereof, as described in said bill of complaint, was sold by the

sheriff of said Douglas county to this defendant and said Redick, and a deed was executed by said sheriff to said purchasers, and that subsequently said Redick conveyed his undivided half interest in said portion of said land to this defendant, and that said deeds executed by said Redick and said sheriff were both duly recorded in the office of the clerk of said Douglas county.

And this defendant, further answering said bill of complaint, admits that thereafter another execution was issued on said
49 judgment, and after several appraisals and fruitless attempts to sell such proceedings were had that another portion of said land was offered for sale by said sheriff and on or about the 6th day of September, 1884, was struck off and sold by said sheriff to this defendant, said last portion of said land being as described in said bill of complaint as having been so sold at the date last aforesaid.

And this defendant admits that the said sheriff reported said sale to said district court of Douglas county, and that said court duly approved the same and ordered said sheriff to execute a deed therefor to this defendant, and said sheriff thereupon executed a deed for said land to this defendant, who caused the same to be duly recorded.

And this defendant, further answering said bill of complaint, denies that he had no permission and authority from the said Lay to make either of said bids in his own behalf or in behalf of said Redick, and this defendant also denies that prior to the commencement of this suit he did not account to said defendant Lay for any portion of the amounts so bid by him for said parcels of land, and denies that he suffered said Lay to remain ignorant of said proceedings, and he denies that the only consideration for said sales so as aforesaid made by said sheriff was credits on the judgment for the amounts bid at said sales.

This defendant, further answering said bill of complaint, denies that at the time of said proceedings the said plaintiff was not informed and did not know *of* the recording of the deed executed by him to said corporation had not been recorded or was ignorant of said sales by said sheriff on execution.

And this defendant denies that upon discovering said deed had been placed on record the said plaintiff demanded of the
50 officers of said corporation a deed of said land, but, on the contrary, the said plaintiff well knew at the time said deed was recorded, as hereinbefore alleged, that the same was so recorded and he so represented to said defendant Lay, and upon the strength of such representations he obtained from said Lay the sum of $1,000.00 in cash for the use and benefit of said corporation, the same being the cause of action, with interest, upon which said Lay obtained judgment against said corporation for said sum of $1,398.00 and costs.

The defendant, further answering said bill of complaint, denies that on the 12th day of March, 1887, or at any other time the said defendant Lay assigned said judgment for the consideration of $1,500.00 or any other sum to said plaintiff and executed to him a deed for said land or directed this defendant in writing or otherwise

to convey to said plaintiff any interest acquired by reason of said execution sales.

And this defendant, further answering said bill of complaint, says that any pretended purchase of said judgment from said defendant Lay was at a time when this defendant was the owner thereof by assignment and was with full knowledge and notice on the part of said plaintiff of such ownership and assignment and of the rights of this defendant in the premises, and was with full and actual as well as constructive notice that this defendant was the owner of said real estate.

This defendant, further answering said bill of complaint, admits that he conveyed by deed to said defendants Lay and Tenney the portion of said land in said bill of complaint described as having been so conveyed; but this defendant denies that said deeds
51 were made after the filing of said bill, but, on the contrary, this defendant charges that said deeds were made, executed, and acknowledged on the day which they bear date.

And this defendant admits the commencement and pendency of the several suits mentioned in said bill of complaint, but he denies that the plaintiffs therein are not entitled to support and maintain said suits.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged; without this, that there is any other matter, cause, or thing in said complainant's said bill of complaint contained material for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is not true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

W. J. CONNELL, *Defendant.*

—— ——,
Solicitor for Defendant.

Upon the back of said answer appear endorsements in words and figures following, to wit:

No. 116, M. Circuit court, district of Neb. John A. Smiley *vs.* William J. Connell and Herbert M. Tenney. Answer of defendant Connell. Filed Feb. 15, 1888. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 22nd day of February, 1888, replications were filed in said cause; which said replications
52 are in words and figures following, to wit:

In the United States Circuit Court in and for the District of Nebraska.

JOHN A. SMILEY, Complainant,
vs.
WILLIAM J. CONNELL and HERBERT M. TENNEY and F. H. LAY, Def'ts. } Rep. of Comp't Smiley.

The Replication of the Complainant, John A. Smiley, to the Answer of Defendant Herbert M. Tenney to the Complainant's Amended and Supplemental Bill of Complaint.

This repliant, saving and reserving to himself all and all manner of advantage of exception which may be had or taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant, for replication thereunto saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

SAVAGE, MORRIS & DAVIS,
Solicitors for Complainant.

Upon the back of said replication appear endorsements in words and figures following, to wit:

53 No. 116, doc. M. John A. Smiley *vs.* Wm. J. Connell *et al.* Replication of complainant to the answer of defendant Herbert M. Tenney. Filed Feb. 22, 1888. Elmer D. Frank, clerk. Savage, Morris & Davis, sol's for comp't*s*.

In the United States Circuit Court in and for the District of Nebraska.

JOHN A. SMILEY, Complainant,
vs.
WILLIAM J. CONNELL and HERBERT M. TENNEY and F. H. LAY, Def'ts. } Rep. of Comp't*s* Smiley.

The Replication of the Complainant, John A. Smiley, to the Answer of Defendant William J. Connell to the Complainant's Amended and Supplemental Bill of Complaint.

This repliant, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto saith that he doth and

will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this repliant; without this, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct; and humbly prays as in and by his said bill he hath already prayed.

SAVAGE, MORRIS & DAVIS,
Sol's for Complainant.

Upon the back of said replication appear endorsements in words and figures following, to wit:

No. 116, M. John A. Smiley *vs.* Wm. J. Connell *et al.* Replication of comp't to the answer of defendant Wm. J. Connell. Filed Feb. 22, 1888. Elmer D. Frank, clerk. Savage, Morris & Davis, sol's for comp'ts.

54 Thereupon, afterwards, to wit, on the 22nd day of February, 1888, an answer was filed in said case; which said answer is in words and figures following, to wit:

In the United States Circuit Court in and for the District of Nebraska.

JOHN A. SMILEY, Complainant, *vs.* WILLIAM J. CONNELL, FREDERICK H. LAY, and HERBERT M. TENNEY, Defendants.	Answer of Def't Lay.

The Answer of Frederick H. Lay, One of the Defendants, to the Amended Bill of Complaint of John A. Smiley, Complainant.

This defendant, now and at all times hereafter, saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for answer thereto or unto so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, this defendant, answering, saith—

That the citizenship of the several parties, plaintiff and defendants, is alleged and set forth in said bill of complaint.

And said defendant, further answering, admits that in the year 1874 and for some years prior thereto the said plaintiff was the owner of the real estate described in said petition, but said defendant denies that said plaintiff is now the owner of said real estate, or that said plaintiff for more than fifteen years immediately before the bringing of this suit has been the owner and in the actual possession of said real estate.

And said defendant, further answering said bill of complaint, admits that in the year 1874 a corporation was attempted to be organized and, as this defendant charges, was fully and com-
55 pletely organized under the name of the Union Stock Yards of Nebraska, and this defendant admits that the articles of incorporation of said Union Stock Yards of Nebraska were duly adopted, signed, and recorded, as set forth in said bill of complaint, but said defendant denies that the capital stock of said corporation was subscribed for in amounts sufficient to enable it to become fully organized for the transaction of business.

And said defendant, further answering said bill of complaint, admits that in the year 1874 negotiations were had between the projectors of said corporation, and, as defendant charges, for and on behalf of said corporation, and the said plaintiff for the purchase by said corporation of the land described in said bill of complaint, and that said plaintiff signed a deed of said land to said corporation, which deed this defendant alleges was duly acknowledged by said plaintiff and was also duly signed and acknowledged by the wife of said plaintiff.

The said defendant, further answering said bill of complaint, denies that said deed was delivered to one E. F. Smythe, as attorney for said plaintiff, to be held until said corporation should comply with any terms of purchase or until its capital stock should be fully subscribed for or until the happening of any other event or the doing of any other thing; but, on the contrary, this defendant charges that said deed was executed and delivered for the purpose of absolutely and immediately transferring and conveying said real estate to said Union Stock Yards of Nebraska and enabling the said corporation to have and obtain credit and to furnish the necessary and required yards for stock purposes, the said plaintiff having been one of the chief organizers of said corporation and then being one of the incorporators thereof and its general manager.

56 And this defendant denies that said Smythe, without any authority, consent, or knowledge of said plaintiff, caused said deed to be filed and recorded; but, on the contrary, this defendant charges that on said 20th day of February, 1875, the said deed was duly filed in the office of the county clerk of said Douglas county, with the knowledge and by the authority of said plaintiff, who was then the general manager of said corporation as aforesaid, for the express purpose of having the title shown of record to be in said corporation in order to enable said plaintiff as such general manager to carry forward the purpose of the organization of said corporation, and to enable him to make purchases for said corporation and obtain credit for and on behalf of said corporation.

And said defendant, further answering said bill of complaint, admits that the consideration to be paid for said conveyance of said land was stock in said corporation to the amount of $28,000.00, but said defendant denies that said corporation never complied with the terms agreed upon and never delivered or offered to deliver to said plaintiff any portion of said stock, and said defendant denies that the organization of said corporation was abandoned by the

projectors of said corporation or that it did not engage in business, but, on the contrary, this defendant charges that said corporation was fully organized and officers were duly elected, of which plaintiff was one, as hereinbefore stated, and business was transacted by said officer, especially by said plaintiff, for and on behalf of said corporation, and a large amount of stock was issued to said plaintiff and others, the amount issued to said plaintiff, as this defendant is informed and believes, being the full amount of the consideration named in said deed, to wit, the sum of $28,000.

This defendant, further answering said bill of complaint, admits that on the 13th day of February, 1879, this defendant obtained a judgment against the said Union Stock Yards Company of Nebraska, in the district — in and for the county of Douglas, State
57 of Nebraska, for the sum of $1,398.00 and costs in a certain action then pending in said court wherein this defendant was plaintiff and the said Union Stock Yards of Nebraska was defendant, and that in said suit said defendant Connell and his then law partner, John I. Redick, were the attorneys for this defendant and personally managed the same on behalf of this defendant.

And this defendant admits that thereafter, to wit, on or about the 17th day of August, 1881, an execution was issued on said judgment and levy thereof made on a portion of said land, and a portion thereof as described in said bill of complaint was sold by the sheriff of said Douglas county to said Redick and Connell, and a deed was executed by said sheriff to said purchasers, and that subsequently said Redick conveyed his undivided half interest in said portion of said land to said Connell, and that said sheriff's deed and said deed executed by said Redick were both duly recorded in the office of the clerk of said Douglas county.

And this defendant, further answering said bill of complaint, admits that thereafter another execution was issued on said judgment and, after several appraisals and fruitless attempts to sell, such proceedings were had that another portion of said land was offered for sale by said sheriff, and on or about the 6th day of September, 1884, was struck off and sold by said sheriff to said Connell, said last portion of said land being as described in said bill of complaint as having been sold at the date last aforesaid.

And this defendant admits that the said sheriff reported said sale to said district court of Douglas county, and that said court duly approved the same and ordered said sheriff to execute a deed therefor to said Connell, and said sheriff thereupon executed a deed for said land to said Connell, who caused the same to be duly recorded.

And this defendant, further answering said bill of complaint, denies that said Connell had no permission and authority from this defendant to make either of said bids in his own behalf or in
58 behalf of said Redick; and this defendant also denies that prior to the commencement of this suit said Connell did not account to this defendant for any portion of the amounts so bid by him for said parcels of land, and denies that he suffered this defendant to remain ignorant of said proceedings; and he denies that the

only consideration for said sales so as aforesaid made by said sheriff was credits on the said judgment for the amounts bid at said sales.

This defendant, further answering said bill of complaint, denies that at the time of said proceedings the said plaintiff was not informed and did not know *of* the recording of the deed executed by him to said corporation had not been recorded or was ignorant of said sales by said sheriff on execution.

And this defendant denies that, upon discovering said deed had been placed on record, the said plaintiff demanded of the officers of said corporation a deed of said land, but, on the contrary, the said plaintiff well knew at the time said — was recorded, as hereinbefore alleged, that the same was so recorded, and he so represented to this defendant, and, upon the strength of such representations, he obtained from this defendant the sum of $1,000.00 in cash for the use and benefit of said corporation, the same being the cause of action, with interest, upon which this defendant obtained judgment against said corporation for said sum of $1,398 and costs.

This defendant, further answering said bill of complaint, denies that on the 12th day of March, 1887, or at any other time, this defendant assigned said judgment for the consideration of $1,500.00 or any other sum to said plaintiff and executed to him a deed for said land or directed said defendant Connell in writing or otherwise to convey to said plaintiff any interest acquired by reason of said execution sales.

59 And this defendant, further answering said bill of complaint, says that any pretended purchase of said judgment from this defendant was consum-ated with one Muldoon and in pursuance of a fraudulent combination and conspiracy between said Muldoon and said plaintiff and at a time when said Muldoon had no power or authority to make such assignment, as said plaintiff then well knew, and at a time when said judgment and all rights thereunder and all interest in said land had been assigned by this defendant, as said plaintiff then well knew, to said defendant Connell.

This defendant, further answering said bill of complaint, admits that said Connell conveyed by deed to this defendant and to said defendant Tenney the portions of said land in said bill of complaint described as having been so conveyed, but this defendant denies that said deeds were made after the filing of said bill, but, on the contrary, this defendant charges that said deeds were made, executed, and acknowledged on the day which they bear date, and this defendant admits the commencement and pendency of the several suits mentioned in said bill of complaint, but he denies that the plaintiff therein are not entitled to support and maintain said suits.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged; without this, that there is any other matter, cause, or thing in said complainant's said bill of complaint contained material for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is not true to the knowledge or belief of this defendant; all which

matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

60–190 F. H. LAY, *Defendant*,
By W. J. CONNELL, *Att'y*.

Upon the back of said answer appear endorsements in words and figures following, to wit:

No. 116, M. U. S. circuit court, district of Nebraska. John A. Smiley *vs.* William J. Connell, Frederick H. Lay, and Herbert M. Tenney. Answer of defendant Lay. Filed Feb'y 22, 1888. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the said 22nd day of February, 1888, replication was filed in said case; which said replication is in words and figures following, to wit:

In the United States Circuit Court in and for the District of Nebraska.

JOHN A. SMILEY, Complainant,
vs.
WILLIAM J. CONNELL and HERBERT M. TENNEY and J. H. LAY, Def'ts. } Repl. of Compl't Smiley.

The Replication of the Complainant, John A. Smiley, to Answer of Defendant F. H. Lay to the Complainant's Amended and Supplemental Bill of Complaint.

This repliant, saving and reserving to himself all and all manner of advantage of exception which may be had or taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendant, for replication thereunto saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material of effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

SAVAGE, MORRIS & DAVIS,
Solicitors for Complainant.

Upon the back of said replication appear endorsements in words and figures following, to wit:

No. 116, doc. M. John A. Smiley *vs.* W. J. Connell *et al.* Repli-

cation of compl't to answer of F. H. Lay. Filed Feb. 22, 1888 Elmer D. Frank, clerk. Savage, Morris and Davis, sol's for compl't.

191 JOHN A. SMILEY
vs.
WILLIAM J. CONNELL, FREDERICK H. LAY, and HERBERT M. TENNEY. } 116, M.

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows:

The court doth order, adjudge, and decree that the complainant has shown a legal title to all those tracts or parcels of land which are described and set forth in the two deeds executed by the sheriff of the county of Douglas, State of Nebraska, one dated Jan'y 10th, 1882, in which John I. Redick and William J. Connell are grantees; one dated December 22d, 1884, in which William J. Connell is grantee; which lands are described as follows, to wit:

Beginning at the southwest corner of the southeast quarter of section three, township fifteen north, range fifteen east, of the 6th principal meridian, thence running east eighty rods, thence north ten rods, thence west eighty rods, thence south ten rods to place of beginning, except a strip 100 feet wide running across said land and being the right of way of the Omaha and Northwestern Railway Company; also beginning ten rods north of the southeast corner of the southwest quarter of said southeast quarter of said section three, thence running north fifty-eight rods, thence west twenty rods, thence south fifty-eight rods, thence east twenty rods to the place of beginning.

Beginning at a point ten rods north of the southwest corner of the southeast quarter of section three, township fifteen north, range thirteen east, of the 6th P. M., running thence east sixty rods, thence north fifty-eight rods, thence west sixty rods, thence south fifty-eight rods to the place of beginning.

192 And it is further ordered, adjudged, and decreed that the said complainant has shown sufficient matter of equity to entitle him to a release by said defendants of all their claim and to be quieted in the possession and enjoyment of said parcels of land. The court doth further order, adjudge, and decree that the said sheriff's deeds be henceforth forever held for naught, both in law and equity, to convey any title or interest in said parcels of land.

It is further ordered, adjudged, and decreed that an injunction issue to said defendants commanding them, their agents and attorneys, aiders, abettors, grantors, and assigns, to refrain perpetually from any molestation or disturbance of the right and possession of said complainant under any title of or through said William J. Connell and from proceeding at law to obtain possession of said lands.

It is further ordered, adjudged, and decreed that the said defendants execute and deliver to the complainant a deed or deeds of release and quitclaim releasing and quitclaiming to the complainant

all the rights, title, interest, and estate of said defendants in the said parcels of land, and in case said defendants shall not within twenty days from this date execute and deliver to complainant such deed or deeds the same shall be executed in behalf of said defendants by Elmer S. Dundy, Jr., one of the masters of this court, which deed when executed by said master shall be effectual to convey to said complainant all the rights, title, interest, and estate of said defendants.

It is further ordered, adjudged, and decreed that the complainant recover of the defendants his costs herein to be taxed by the clerk.

To the jurisdiction of the court to render a decree herein the said respondents object, and to which several findings and each
193 thereof and to which said decree the said respondents except and pray an appeal, which is hereby allowed, and the amount of the bond for appeal is hereby fixed at $500.00, the same to be for supersedeas and costs.

(Signed) DAVID J. BREWER,
Circuit Judge.

Thereupon, afterwards, to wit, at the May adjourned term of said court, on the 26th day of July, 1889, the following proceedings were had and done in said cause, as appears of record on folio 628, Journal "N" of said court, to wit:

AT CHAMBERS OF THE CIRCUIT JUDGE, *July* 26, 1889.

JOHN A. SMILEY
vs.
WILLIAM J. CONNELL, FREDERICK H. LAY, and HERBERT M. TENNEY. } 116, M.

It appearing that the defendants herein have failed to perfect their appeal allowed on the entry of the decree herein and have failed to execute to the complainant deeds of the land described in the decree, as therein directed, it is ordered that the master appointed by the court for that purpose forthwith execute and deliver to the complainant a deed of the land described in the bill of complaint and decree, as provided by said decree.

(S'g'd) DAVID J. BREWER,
Circuit Judge.

July 26th, 1889.

Thereupon, afterwards, to wit, on the 27th day of July, 1889, report of deed was filed in said case; which said report of deed is in words and figures following, to wit:

Final Report.

To the judges of the circuit court of the United States for the district of Nebraska:

194 The undersigned, special master in chancery of the circuit court of the United States for the district of Nebraska, would

respectfully report that, in pursuance of a decree of the circuit court of the United States for said district, rendered at the May term, A. D. 1888, in case of John A. Smiley against William J. Connell *et al.*, I did, on the 27th day of July, A. D. 1889, execute and deliver to John A. Smiley (by H. J. Davis, att'y) a deed of conveyance, duly acknowledged, for the following-described real estate, lying and being in Douglas county, Nebraska, to wit: Beginning at S. W. cor. of S. E. ¼ of sec. 3, town. 15 N., range 15 E., 6th P. M., thence running east 80 rods, thence north ten rods, thence west 80 rods, *then* thence south 10 rods to place of beginning, except a strip 100 feet running across said land and being the right of way of the Omaha & Northwestern Railway Co.; also, beginning 10 rods north of the S. E. cor. of the S. W. ¼ of S. E ¼ of sec. 3, thence running north fifty-three rods, thence west 20 rods, thence south 53 rods, thence east 20 rods to place of beginning. Beginning at a point ten rods north of S. W. corner of S. E. ¼ of sec. 3, town. 15 N., range 13 E., running thence east 60 rods, thence north 58 rods, thence west 60 rods, thence south 58 rods to the place of beginning, the same having been heretofore, to wit, on the 27th day of July, A. D. 1889, ordered deeded by special master *of* chancery by Hon. D. J. Brewer, cir. judge.

Dated at Omaha this 27th day of July, A. D. 1889.

E. S. DUNDY, JR.,
Master in Chancery.

Upon the back of said report of deed appear endorsements in words and figures following, to wit:

No. 116, docket M. Special master's report of deed on foreclosure—E. S. Dundy, Jr., master in chancery—to John A. Smiley. Filed Jul- 27, 1889. Elmer D. Frank, clerk. Fees, $10.00; paid by H. J. Davis.

195 Thereupon, afterwards, to wit, on the 20th day of November, 1889, petition for allowance of appeal was filed in said case; which said petition is in words and figures following, to wit:

United States Circuit Court, District of Nebraska.

JOHN A. SMILEY, Complainant,
vs.
WILLIAM J. CONNELL *et al.*, Respondents. } Petition for Allowance of Appeal.

To the honorable the circuit court of the United States for the district of Nebraska:

And now comes the respondents in the above cause and represents that at the May, 1888, term of said court a decree was entered by said court in favor of said complainant and against the respondents in the above-entitled cause, and that said respondents within the two years allowed by law for taking an appeal desire to and propose to appeal to the Supreme Court of the United States. Wherefore the said respondents pray for an allowance of said ap-

peal in order that the same may be properly and lawfully taken, so as to be duly docketed and entered in said Supreme Court within two years from the date of said decree.

W. J. CONNELL,
For Self & Others, Respondents.

Upon the back of said petition appear endorsements in words and figures following, to wit:

No. 116, M. U. S. circuit court, district of Nebraska. John A. Smiley *vs.* William J. Connell. Petition for allowance of appeal. Filed Nov. 20, 1889. Elmer D. Frank, clerk. W. J. Connell.

Thereupon, afterwards, to wit, on the said 20th day of November, 1889, notice of hearing application for allowance of appeal was filed in said case; which said notice is in words and figures following, to wit:

United States Circuit Court, District of Nebraska.

196 JOHN A. SMILEY, Complainant, *vs.* WILLIAM J. CONNELL *et al.*, Respondents. } Notice of Application for Allowance of Appeal.

To said complainant and his counsel:

Please take notice that said respondents have filed in this cause their petition for an allowance of an appeal from the decree rendered herein at the May, 1888, term of said court to the Supreme Court of the United States, and that said petition will be heard by said circuit court, at the court-room of said court, in Omaha, Neb., on Friday, Nov. 22nd, 1889, or as soon thereafter as said court will consent to hear the same.

W. J. CONNELL,
For Self and Other Respondents.

Upon the back of said notice appear endorsements in words and figures following, to wit:

THE STATE OF NEBRASKA, } ss:
Douglas County, }

John Q. Burgner, being first duly sworn, deposes and says that he delivered personally a true copy of the within notice to J. M. Woolworth, Esq.; also to J. W. Savage and H. J. Davis, of the firm of Savage, Morris and Davis.

JOHN Q. BURGNER.

Sworn to before me and signed in my presence *to* John Q. Burgner this 20th day of Nov., 1889.

[SEAL.] CHARLES W. LYON,
Notary Public.

No. 116, M. U. S. circuit court, district of Nebraska. John A. Smiley *vs.* William J. Connell *et al.* Notice of hearing of application for allowance of appeal. Filed Nov. 20, 1889. Elmer D. Frank, clerk. W. J. Connell.

197 Thereupon, afterwards, to wit, at the November term of said court, on the 23rd day of November, 1889, the following proceedings were had and done in said cause, as appears of record on Journal "N" of said court, to wit:

JOHN A. SMILEY, Complainant, *vs.* WILLIAM J. CONNELL *et al.*, Respondents. } 116, M. Order Allowing Appeal and Approving Bond.

On this day this cause came on to be heard on the petition of said respondents for allowance of an appeal herein to the Supreme Court of the United States, and, the court being fully advised in the premises, it is ordered that an appeal from the decree rendered herein *to* and hereby is allowed and the bond submitted by said respondents *to* and hereby is approved and ordered to be filed.

(S'g'd) ELMER S. DUNDY, *Judge.*

Thereupon, afterwards, to wit, on the 23rd day of November, 1889, bond was refiled in said case; which said bond is in words and figures following, to wit:

Know all men by these presents that we, W. J. Connell, as principal, and P. M. Chadwick, as surety, of Omaha, Neb., are held and firmly bound unto John A. Smiley in the full and just sum of five hundred dollars, to be paid to the said John A. Smiley, his executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between John A. Smiley, complainant, and William J. Connell, Frederick

198 H. Lay, and Herbert M. Tenny, respondents, a decree was rendered against the said William J. Connell, Frederick H. Lay, and Herbert M. Tenny, and by the terms of said decree and appeal was prayed for by said respondents and was by said court duly allowed to the Supreme Court of the United States upon the giving of a bond for $500, the said bond to operate as a supersedeas as well as for costs;

And whereas said respondents have made application for a transcript and record of said case to file in the Supreme Court of the United States and intend to perfect and complete said appeal:

Now, the condition of the above obligation is such that if the said William J. Connell, Frederick H. Lay, and Herbert M. Tenny shall prosecute said appeal to effect and answer all damages and costs if

they fail to make said appeal good, then the above obligation to be void; else to remain in full force and virtue.

W. J. CONNELL.
P. M. CHADWICK.

Approved by—
ELMER S. DUNDY, *Judge.*

23 Nov., 1889.

Upon the back of said bond appear endorsements in words and figures following, to wit:

No. 116, M. United States circuit court, district of Nebraska. John A. Smiley *vs.* W. J. Connell *et al.* Bond. Filed June 30th, 1888. Elmer D. Frank, clerk. Refiled Nov. 23, 1889. Elmer D. Frank, clerk.

199 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, Elmer D. Frank, clerk of the circuit court of the United States for the eighth circuit and district of Nebraska, certify that the foregoing folios, from one to 199, contain true and faithful transcripts of the pleadings, process, and proceedings of record and on file in my office as such clerk, and the whole thereof, and the endorsements thereon in the case of John A. Smiley *vs.* William J. Connell *et al.*

Seal United States Circuit Court, District of Nebraska.

Witness my hand and the seal of said circuit court, at Omaha, Nebraska, this 26th day of November, A. D. 1889.

ELMER D. FRANK, *Clerk.*

200 UNITED STATES OF AMERICA, ss:

The President of the United States to John A. Smiley, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to an order allowing an appeal filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein William J. Connell, Frederick H. Lay, and Herbert M. Tenny are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, this 30th day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

[Seal United States Circuit Court, District of Nebraska.]

ELMER S. DUNDY, *Judge.*

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 30th day of Dec'r, 1889, I received this citation and on the 30th day of Dec'r, 1889, I served the same on the within-named John A. Smiley in Douglas county, State and district of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the endorsements thereon.

BRAD. D. SLAUGHTER,
United States Marshal for the District of Nebraska,
By D. H. MERCER,
Deputy United States Marshal.

[Endorsed:] Filed Jan. 7, 1890. Elmer D. Frank, clerk.

201 On this 30th day of December, in the year of our Lord one thousand eight hundred and eighty-nine, personally appeared D. H. Mercer before me, the subscriber, and makes oath that he delivered a true copy of the within citation to John A. Smiley at Omaha, in Douglas county, Nebraska.

——.

Sworn to and subscribed the thirtieth day of December, A. D. 1889.

{ Notarial Seal Chas. W. Lyon, Douglas County, Nebraska. }
{ Commission expires July 3, 1895. }

CHAS. W. LYON,
Notary Public.

[Endorsed:] Filed Jan. 7, 1890. Elmer D. Frank, clerk.

Marshal's Costs.

Service	2 00
Mileage	6
Total	2 06

Endorsed on cover: Case No. 13,977. Nebraska C. C. U. S. No. 78. William J. Connell, Frederick H. Lay, and Herbert M. Tenny, appellants, *vs.* John A. Smiley. Filed February 25, 1890.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1893.

CASE NO. 13,977. TERM NO. ...

WILLIAM J. CONNELL, ET AL.,
Appellants,

vs.

JOHN A. SMILEY,
Appellee.

MOTION TO DISMISS.

BRIEF OF WILLIAM J. CONNELL, *PRO SE*, IN SUPPORT OF MOTION.

THE MOTION.

The motion now submitted for decision is made by the appellants, and is for an order dismissing all proceedings in this court and remanding the cause to the court below to be by it remanded to the state court on the ground that the federal courts are without jurisdiction over the controversy.

STATEMENT OF PROCEEDINGS.

The original action was brought by the appellee, John A. Smiley, against William J. Connell, one of the appellants, in the District Court of Douglas County, Nebraska. The purpose of the suit was to quiet appellee's title to eighty acres of land described in the petition, by setting aside an execution, the levy and sale there-

under and the sheriff's deed in pursuance of such levy and sale, which created an adverse title in Connell. The latter, when the action was commenced, was the sole owner of record under the adverse title. Both parties were citizens of the State of Nebraska. After the expiration of the time fixed by the code of Nebraska for the filing of Connell's pleading to the petition, but before the lapse of additional time given by special orders of the court, the appellants, Lay and Tenny, intervened in the suit, and were made parties defendant on their representation that they had interests in the land in controversy. Immediately upon coming into the suit, the intervenors filed their petition for the removal of the cause to the federal court, alleging diverse citizenship as regarded the appellee, and that each of the intervenors "own and claim separate and distinct portions of said land." (Ex. Rec., p. 14). The state court sent the case to the United States Circuit Court for the District of Nebraska, which heard and determined the controversy and entered a decree annulling the sheriff's deeds to Connell and quieting the title to the land in appellee. (Ex. Rec., p. 39). The decree preserved the objection of appellants to the jurisdiction of the court. (Ex. Rec., p. 40). It is from the foregoing judgment of the Circuit Court that the appeal now pending here was prayed and allowed.

THE PRESENT CONTENTION.

The points relied upon to support the motion now under consideration are that the removing petitioners are purchasers from Connell *pendente lite*, and therefore subject to the disability of their grantor to remove the cause from the state court, and that there was no separable controversy in the case permitting such removal.

The familiar provisions of the statute involved in the contention are the following:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one

or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

"Sec. 3. That whenever any party entitled to remove any suit mentioned in the next preceding section * * * may desire to remove such suit from a State court to the circuit court of the United States, he may make and file a petition in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff for the removal of such suit into the circuit court" * * * (25 St. U. S., c. 866, sec. 23).

I.

The removing petitioners were purchasers pendente lite, and as such they entered the suit subject to all the disabilities resting upon their grantor; the grantor had no right of removal for the reason that he was of like citizenship with appellee, and for the further reason, that he was barred by lapse of time when the removal petition was filed.

The facts establishing the condition of Tenny and Lay as purchasers *pendente lite*, are plainly shown by the record. As disclosed by their answers, all the interest they claimed in the land was derived from Connell, the sole defendant to the appellee's action when first begun. (Ex. Rec. pp. 22-37). It only remains to fix the time at which those interests passed from Connell to them. Was it before or after the commencement of appellee's suit? If after, then they were purchasers *pendente lite*.

As to the time when the deeds from Connell to the intervenors were made, there is a dispute, the appellee claiming that they were made subsequent to the beginning of his action and dated back, while the appellants claim that they were "*made, executed and acknowledged*" on the day of their date. (Ex. Rec., pp. 28-32). But it must be conceded that for the purpose of determining when the estate of the grantees in the land was actually created, the date of the making of the deeds is immaterial. The deeds could not operate to pass the interest in the land from Connell to his grantees before

they were delivered. Until delivered they were as powerless to divest title as though they had never been signed.

As to delivery, it will be noticed that the appellee, in substance, charged that the deeds never were delivered to the grantees; that Connell signed them and acknowledged them, and subsequent to the bringing of the action "caused the said deeds to be recorded." (Ex. Rec., p. 22). That important allegation is not denied by any of the defendants, nor is it any where affirmatively stated in the answers that the deeds were delivered prior to the commencement of the suit. It stands confessed by the pleadings that whatever may have been the time that the deeds were signed and acknowledged, they were not delivered until after the appellee had begun his suit. It follows that the intervenors not only took their titles from Connell, but also received them from him after the land had been brought into court by the appellee's suit. This made them purchasers *pendente lite.*

But there is another fact in the record which also puts the intervenors in the condition of purchasers *pendente lite.* When the appellee began his action the deeds to the intervenors had not been recorded. The law is well established that the holder of an unrecorded deed holds subject to the *lis pendens.* (Am. & Eng. Enc. Law, Vol. 13, p. 907, and cases cited).

On both of the grounds above given—the failure to deliver, and the failure to record the deeds, prior to the appellee's suit—the intervenors were purchasers *pendente lite.* The Nebraska statute relating to the *lis pendens*, at that time was as follows:

"When the summons has been served, or publication made, the action is pending, so as to charge third persons with notice of its pendency, and while pending, no interest can be acquired by third persons in the subject matter thereof, as against the plaintiff's title." (St. Neb. Rev. 1873, Ch. 57, sec. 85).

The existence of the foregoing facts of their case brought the intervenors completely within the operation of the rule that "a purchaser *pendente lite* connects himself with the suit subject to all the disabilities of the other parties in respect to a removal at the time

he came in." (*Cable vs. Ellis*, 110 U. S., 389; *Jefferson vs. Driver*, 117 U. S., 272).

The disabilities, in respect to the removal of the cause, which attached to Connell at the time of the filing of the petition for removal, were two in number. The first was that his citizenship was the same as that of the appellee. The second was equally fatal to the right of removal. It was that the time for removing the cause had elapsed. This will plainly appear from the following references to the record.

The appellee's petition was filed in the State court March 16th, 1887. (Ex. Rec., p. 1). The code of Nebraska (Neb. Code, sec. 110) required Connell to plead to the petition "on or before the third Monday * * after the return day of the summons." The return day of the summons was March 28th, 1887. (Ex. Rec., p. 3). Therefore the answer day fell on some Monday in April. But the removal petition was not filed until July, and was clearly out of time, unless the special orders of the state Court, extending the time within which Connell was required to plead, operated to extend the time for the removal of the cause to the federal court. That they did not so operate, and that the words of the removal act (*supra*), "or the rule of the State court in which such suit is brought" are without force where the state statute fixes a definite time to answer or plead, is demonstrated by the cogent reasoning contained in the opinion of one of the circuit judges, whose decision I beg leave to cite in the absence of any adjudication of the precise question by this court. (*Viele vs. Manufacturer's Accident Co.*, 40 Fed., 545). The conclusion of the able judge in the case referred to, that "the statute or the general rule of the court, not the order or stipulation made in the particular case, speaks the time" for the answer or plea, in the construction of the removal act, is in complete harmony with the decision of this court in *Edrington vs. Jefferson*, 111 U. S., 770, involving the same general principle.

We submit that the intervenors, in coming voluntarily into this cause as purchasers *pendente lite*, subjected themselves to both

of Connell's disabilities respecting his right of removal, namely, his lack of diverse citizenship, and the lapse of the time limited for filing a removal petition. That being true, the court below was without jurisdiction.

II.

In this case there is no "controversy which is wholly between citizens of different states, and which can be fully determined as between them."

The inseparable nature of the controversy is clearly shown on the face of the appellee's original petition (Ex. Rec., p. 1). The petition states, in effect, that the appellee had made a deed of the premises in litigation, in which the Union Stock Yards Company of Nebraska was named as grantee; that the deed had never been delivered, but, contrary to the intention of the grantor, and without either his consent or his knowledge it had been placed upon record; that a judgment creditor of the grantee had levied his execution upon the land described in the deed and caused the same to be sold as and for the property of such grantee, and that by virtue of a sheriff's deed and a *mesne* conveyance the title so created had come to the defendant Connell. The specific prayer of the petition was that the court might decree "that said Connell took no interest in said land by reason of said sale upon execution issued on said judgment; that the said sheriff's deeds be set aside and the title to said land quieted in plaintiff."

It is at once apparent that the fundamental controversy, upon which depended all the rights of the litigating parties, was whether the land described in the petition was rightfully subjected to levy and sale as the property of the grantee named in the appellee's deed. All other issues tendered by the petition were merely incidental to the main proposition.

Pending Connell's answer to this petition, the removing petitioners voluntarily appear in the case, and, by their petition for removal, introduce the additional element that they own "separate and distinct portions of said land."

Their titles, it is admitted, came from Connell. The only change they bring over the case is a claim upon their part to hold, under the Connell title, respectively, 30 and 10 acres out of the 80 acres which the sheriff levied upon. This claim is not disputed by any party to the litigation, so no new issue is made by their intervention. The controversy remains exactly the same after they intervened as it was before, a contention over the right of the sheriff to levy the execution upon the land named in the petition. There is no ground upon which it can be claimed they had a separable controversy with the appellee, within the meaning of the removal act. There was but one cloud upon the appellee's title and to remove its shadow from his land as a whole, was the purpose of his suit. It was not competent for the intervenors, when the appellee had made by his petition one controversy covering all his grievance, to divide and separate it into as many parts as there were claimants under the Connell title, for the purpose of removing the whole from the State court. The inseparable nature of the controversy is conclusively shown by the fact that no final judgment could be entered in the cause favorable to one defendant and adverse to any other defendant. If the execution sale were invalid as to a part of the tract, it was invalid as to all.

This case falls clearly and fully within the principle upon which this court decided there was no separable controversy in *Brown et al. vs. Trousdale et al.*, 138 U. S., 389. I quote from the opinion:

"Testing the right of removal by the case as made by the present bill and as it stood at the time of removal, it was a case against all the bondholders, in respect to whom it was not denied that a large number were citizens of Kentucky, upon a cause of action not susceptible of division. The plaintiffs were not prosecuting an action against individual bondholders for the cancellation of individual bonds. They were attacking the validity of the entire subscription, and seeking a decree which would invalidate the entire issue. The petitioners were out of the jurisdiction, and, if they had remained so, would not have been concluded. The federal courts were open to them for the pursuit of the remedies which the law afforded. When they voluntarily submitted themselves to the jurisdiction of the state court, they became so associated with the resident bondholders as to render it impossible for them to contend

that the controversy which involved all was separable as to them, and that they were thereby enabled to transfer the particular suit, as it affected all the defendants, to the circuit court. The decree is reversed, and the cause remanded, with directions to remand it to the state court."

The other decisions of this court, to which special reference is made as closely applicable to the present contention, are the following: *Fraser vs. Jennison*, 106, U. S., 191; *Fidelity Trust and Safe Deposit Co. vs. Huntington*, 117 U. S., 280; *Hedge Co. vs. Fuller*, 122 U. S., 535; *Graves vs. Corbin*, 132 U. S., 571; *Torrence vs. Shedd*, 144 U. S., 527.

In the case last cited the court has stated with care and clearness the principle involved in this controversy, and collates the cases, showing its growth and various applications, in these words:

"As this court has recently affirmed, not only in cases of joint contracts, but in actions for torts, which might have been brought against all or against any of the defendants: "Separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject matter of the controversy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings." *Railroad Co. vs. Ide*, 114 U. S., 52, 56; 5 Sup. Ct. Rep., 735. *Pirie vs. Tvedt*, 115 U. S., 41, 43; 5 Sup. Ct. Rep., 1034, 1161. *Sloane vs. Anderson*, 117 U. S., 275, 6 Sup. Ct. Rep., 730. *Little vs. Giles*, 118 U. S., 596, 601, 602; 7 Sup. Ct. Rep., 32. *Hedge Co. vs. Fuller*, 122 U. S., 535; 7 Sup. Ct. Rep., 1265.

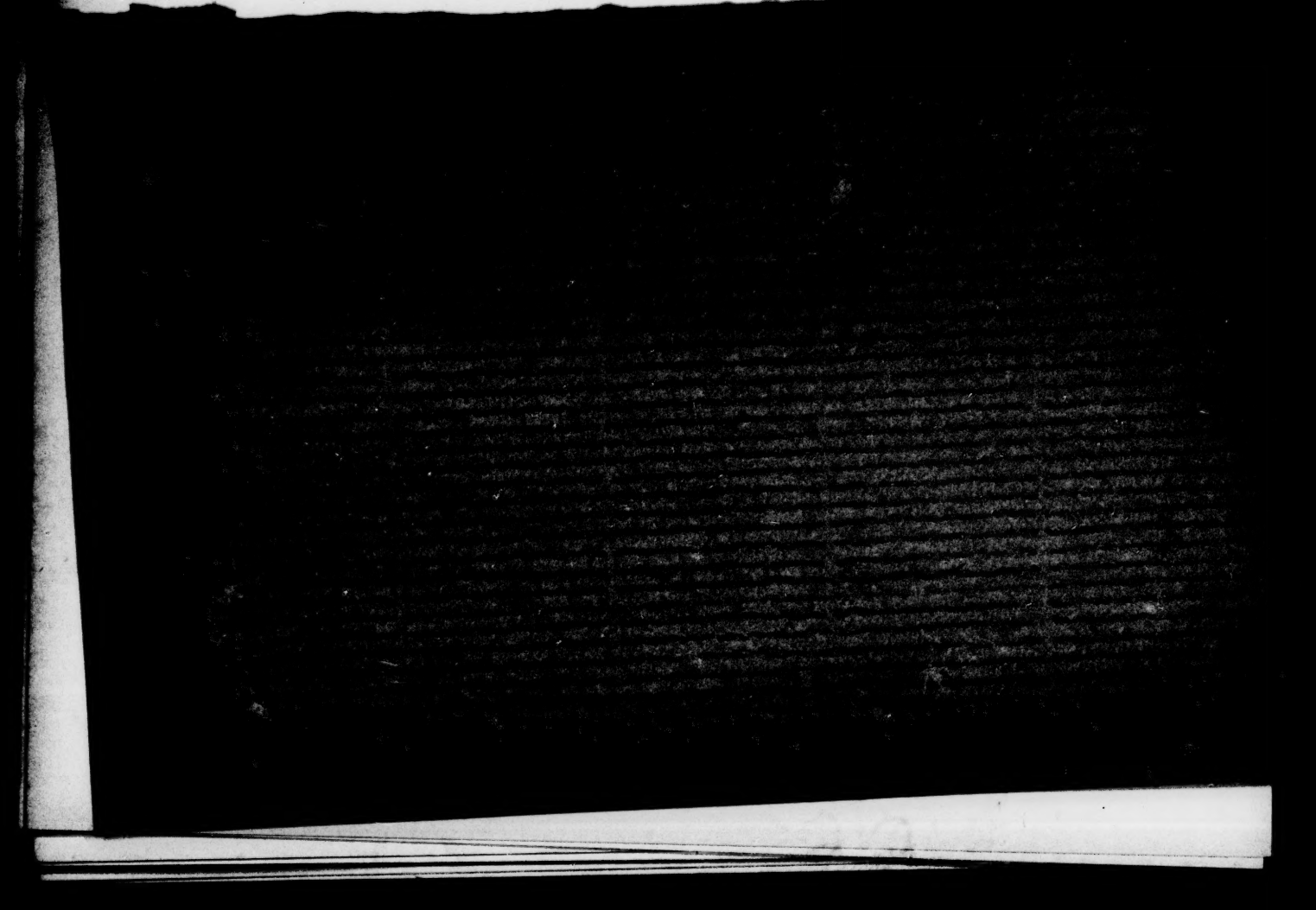
In *Shainwald vs. Lewis*, above cited, which was a suit brought by one partner for the settlement of the partnership affairs, a judgment creditor of the defendant and a receiver appointed in a suit upon the judgment were admitted as defendants, and it was held that there was no separable controversy between them and the plaintiff which would entitle them to remove the case, the court saying: "The suit was brought to close up the affairs of an alleged partnership. The main dispute is about the existence of a partnership. All the other questions in the case are dependent upon that. If the partnership is established, the rights of the defendants are to

be settled in one way; if not, in another. There is no controversy in the case now which can be separated from that about the partnership, and fully determined by itself." 108 U. S., 158, 2 Sup. Ct. Rep., 387."

Tested by the decisions in the above cited cases, the intervening petitioners, on coming into this cause, neither found nor introduced any separable controversy which would justify a removal to the federal court.

Upon the law applicable to the facts of this case, it is respectfully submitted, that the court below was without jurisdiction to hear and determine the controversy of the parties to this suit, and that the decree herein should be set aside and the cause remanded to the State court.

W. J. CONNELL,
Appellant, pro se.



Supreme Court of the United States.

OCTOBER TERM. 1894.

Case Number 13,977. Term Number_____.

WILLIAM J. CONNELL, ET AL.
Appellants.
vs.
JOHN A. SMILEY,
Appellee.
MOTION.

ADDITIONAL BRIEF OF WILLIAM J. CONNELL, APPELLANT, *PRO SE.* IN SUPPORT OF MOTION.

It is not my desire to re-argue any point made in my first brief. I wish solely to present authorities upon a position, entirely new to this controversy, taken by the counsel for the appellee. A few words will suffice to show the new point raised, its relation to the arguments, and its inability to affect the decision of the present issue.

In my previous brief I proved from the record that the suit was begun in the state court of Nebraska

by the appellee as sole plaintiff against the appellant as sole defendant; that the record title to the whole eighty acres of land involved in the controversy was then in this appellant; that both of said parties were citizens of the state of Nebraska, which fact was affirmatively shown upon the face of the record; and that the removing petitioners subsequently came into the case as intervenors and purchasers *pendente lite*. Upon that state of facts the legal position was taken that the removing petitioners, being such purchasers *pendente lite*, were subject to the disability of their grantor, originally the sole defendant, who was a citizen of the same state as his adversary: and that since he could not remove the case, they could not.

I further established by the record that the object and purpose of the suit was to obtain a decree "that the said Connell took no interest in said land by reason of said sale upon execution issued on said judgment; that the said sheriff's deeds be set aside and the title to said land quieted in plaintiff." Such being the object and purpose of the suit, I also showed that the subject matter of the controversy was single and indivisible, namely the validity of a sheriff's levy upon the entire tract in question, and of the subsequent sale and deeds incident thereto made to the original sole defendant; and that it was in the broadest sense true that no new or different issue was brought into the case by the intervenors. Upon that state of facts I took the position, that the intervenors could not remove the cause to the federal court because there was not in it "any controversy which is wholly

between citizens of different states, and which can be fully determined as between them."

In his answering brief opposing counsel does not controvert any of the facts relied upon in my argument. Nor does he question the soundness of the legal propositions which I claim arise out of those facts. His answer is in the line of confession and avoidance. He assumes, if indeed he does not concede, both the facts and the law to be as stated, and interposes the doctrine of estoppel as a shield. That is the new question raised in the case. He asserts that in reference to each of the above positions the removing petitioners have made during the progress of the trial admissions and statements which prevent me, by way of estoppel, from asking that the case be remanded to the state court. Upon sifting the generalities by means of which a certain amount of plausibility is given to the counsel's claim, it will be found that it is in reality based solely upon two statements made by the removing petitioners: one relating to the *pendente lite*, and the other to the separable nature of the controversy.

As to the statement relating to the pendente lite. This statement was made by the appellant Tenny in his motion in the state court to be made a party defendant. It was that Tenny had an interest in the property in contoversy. It is true, and no denial of it has ever been made by any of these appellants. In addition to the statement made in appellant Tenny's motion all of the appellants stated in their respective answers in substance that the deeds from

Connell to Lay and to Tenny were "made, executed and acknowledged" before the commencement of the suit. That is the extent of all the statements made touching this question. But even granting that the deeds were not only made, executed and acknowledged, but were also delivered prior to the commencement of the suit, concerning which no statement was made, still the removing petitioners are purchasers *pendente lite*, because, as conclusively appears from the record, their deeds were not recorded until after this suit was begun. (See previous brief.)

As to the statement relating to the separable controversy. That statement is contained in the petition for removal and is that "each of said parties own and claim separate and distinct portions of said land." It is the only statement ever made by any of these appellants touching the separable character of the controversy for the purpose of obtaining a removal of the cause. That statement was true, and its truth is not now, nor has been at any time denied, by any of these appellants. So it is evident that up to this point there is nothing in the case on which the law of estoppel can operate.

But it is also true that the attorney for the removing petitioners—the same appellant who made the pending motion to remand—relying in part upon that statement of a separate ownership obtained the removal of the cause to the federal court. That he did in perfect good faith, believing as a conclusion of law, that the condition of the premises disclosed by the statement in question made the cause a separable

controversy within the meaning of the judiciary act. Such without doubt was also the belief of the state judge from whose jurisdiction the cause was removed, and of the federal judge who took cognizance of it. Such certainly was the belief of many members of the bar at that time. For it should be remembered that the long line of decisions by this court defining what was, and what was not, a separable controversy within the meaning of the second section of the removal act, was rendered subsequently to the removal of this cause. That the facts set forth in the appellants' petition for removal, did not make of the appellee's suit such a separate controversy as would authorize its removal to the federal court—at that time a difficult question—has wholly since then been definitely established by the authority of this court speaking in the cases cited in my previous brief. Judge Brewer had not then, successfully forecasting the views of this court, said, "*Whatever might be the rule, if an intervenor presented some new and independent interest or question, when he simply comes in to carry on the litigation over the same issues and questions he acquires no right of removal different from that possessed by him who had been carryiug on the litigation as his representative.*" (*Hakes vs. Burns*, 40 Fed. Rep., 33, (1889.) This entire line of decisions, from that of Judge Brewer anticipating the opinions of the supreme court, to that of Judge Thayer of the court of appeals applying them to a case identical with this in all essentials (*Barth vs. Coler*, 61 Fed. Rep., 466), has come into the reports since Tenny and Lay, upon the advice of their attorney, filed their petition for re-

moval. In the light of those decisions their attorney now believes it is clear that he was mistaken in thinking that the mere fact of separate ownerships would make separate controversies out of what the appellee had made one controversy. Such mistakes are not rare enough to be reprehensible. They occur in the history of better jurists than those here before the court. Nearly every decision which is handed down from this bench convicts some member of its bar of a similar short-coming. Neither courts nor the parties to the suit have been misled by the statement in question. It was a bare statement of a fact from which each might draw his own legal conclusion. They all drew the same conclusion, which turns out to be purely an erroneous conclusion of law. They all shared equally in the error. If an attorney is to be estopped upon grounds of morality from changing his opinion of the law and acting upon his changed views during the progress of a cause, a judge should be estopped from granting a motion for a new trial based upon the errors which he has himself committed. There is as much turpitude in the one case as in the other.

This line of argument is justified by the counsel's brief. In all the cases cited by him from the state courts to sustain his contention for an estoppel, the principle was applied to prevent the denial of some fact previously stated or admitted, and the ground of the application was breach of good faith; in each instance it was the adoption by the court of a rule of morals as a rule of good policy. That is the kind of estoppel now contended for, and the kind of estoppel

enforced by those authorities. I have shown there is no room for its application here.

But it is conceded that while ignorance of the law may clear one from the charge of moral delinquency it excuses no man from the legal consequences of his act; and that there are rights which a litigant having once waived he cannot afterward claim. Is such the position of the appellants in this case? Two of them invoked the jurisdiction of the federal court, and the third was their attorney in the matter, consenting to the transfer for himself, and acting for them in its accomplishment. The same attorney has made the motion to remand to the state court. That is the exact situation. There being no question of bad faith or intentional imposition, the argument of the appellee's counsel presents a purely legal inquiry, which is Has this appellant waived his right to deny the jurisdiction of the federal court in this cause?

To this question I reply that all inquiries as to whether this right has been waived are precluded by the primal fact that it cannot be waived. It is not a subject of waiver—nor of estoppel in any sense of the word, exact or comprehensive. Both the extent of the rule so declaring, and the reason of its being, are thus stated in *Mansfield C. & L. M. R. Co. vs. Swan*, 111 U. S. 379, 4 Sup. Ct. Rep., 510.

"It is true that the plaintiffs below against whose objection the error was committed, do not complain of being prejudiced by it, and it seems to be an anomoly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it: but the rule, springing from the nature and limits of the judicial power of the United States, is

inflexible and without exception which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which in the exercise of that power it is called to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. This rule was adopted in *Capron vs. Van Noorden*, 2 Cranch, 126, decided in 1804, where a judgment was reversed on the application of the party against whom it had been rendered in the circuit court, for want of the allegation of his own citizenship which he ought to have made to establish the jurisdiction which he invoked."

The foregoing language has been many times quoted and approved in the subsequent decisions of this court. Its authority has never been questioned, nor has its doctrine been modified.

The rule is directly applicable to the case at bar. The only ground upon which federal jurisdiction over it could be invoked is that of the diversity of citizenship. Upon one side is the appellee, a citizen of the state of Nebraska; upon the other side are the removing petitioners, citizens of Colorado and Ohio, and this appellant likewise a citizen of the state of Nebraska, and an essential party to the controversy. The appellee brought his suit to determine in one action his rights as against one sheriff's levy, one sale and one title derived thereunder. Not only tested by the appellee's pleading but also by the nature of his claim the controversy had but one subject matter to be litigated. It was not separable by the removing

petitioners. Therefore the requisite diversity of citizenship is wanting, and the court must remand the case to the state court.

GRAVES VS. CORBIN, 132 U. S. 571, 10 Sup. Ct. Rep., 202.

TORRENCE VS. SHEDD, 144 U. S. 527, 12 Sup. Ct. Rep., 728.

PEPER VS. FORDYCE, 119 U. S. 469, 7 Sup. Ct. Rep., 288.

SHAINWALD VS. LÆWIS, 108 U. S. 158, 2 Sup. Ct. Rep., 387.

BROWN, ET AL, VS. TROUSDALE, ET AL, 138 U. S. 389, 11 Sup. Ct. Rep., 308.

FIDELITY TRUST AND SAFE DEPOSIT CO. VS. HUNTINGTON, 117 U. S. 280, 6 Sup. Ct. Rep., 733.

THORN WIRE HEDGE CO. VS. FULLER, 122 U. S. 535, 7 Sup. Ct. Rep., 1265.

RAILROAD CO. VS. IDE, 114 U. S. 52, 56, 5 Sup. Ct. Rep., 735.

PIRIE VS. TVEDT, 115 U. S. 41, 43, 5 Sup. Ct. Rep., 1034, 1161.

SLOANE VS. ANDERSON, 117 U. S. 275, 6 Sup. Ct. Rep., 730.

LITTLE VS. GILES, 118 U. S. 596, 7 Sup. Ct. Rep., 32.

HANRICK VS. HANRICK, 14 Sup. Ct. Rep., 835.

WILSON vs. OSWEGO, TP., 151 U. S. 56, 14 Sup. Ct. Rep., 259.

BROOKS vs. CLARK, 119 U. S. 502; 7 Sup. Ct. Rep., 301.

There has been fault upon both sides. The appellants innocently but wrongfully removed the cause. The appellee acquiesced in its removal. He made no attempt to have the cause remanded. He did not call the attention of the lower court to the question of jurisdiction. In such case, the costs in this court should be divided between the parties. PEPER vs. FORDYCE, *Supra*.

W. J. CONNELL,
Appellant, pro se.

Supreme Court of the United States.

OCTOBER TERM, 1893.

Case Number, 13,977. Term Number, —.

WILLIAM J. CONNELL *et al.*, Appellants,
vs.
JOHN A. SMILEY, Appellee.
} Motion to Dismiss.

Brief of William J. Bryan, Solicitor for Appellee.

STATEMENT.

The original action was brought by appellee, John A. Smiley, against William J. Connell, one of the appellants, in the district court of Douglas county, Nebraska, to quiet title to eighty acres of land described in the petition. Defendant was given additional time to answer, which order was made on the 18th day of June, 1887. On the same day appellant Connell, as attorney for appellant Herbert M. Ten-

ney, filed a motion to make said Tenney a party defendant, which motion, as appears from the record (Ex. Rec., p. 11), read as follows: "And now comes Herbert M. Tenney, and hereby represents that he has, and at the time of the commencement of this action did have, an interest in the property in controversy herein, and he therefore asks to be made a party defendant and so allowed to file an answer herein and defend his said interest. Herbert M. Tenney, by W. J. Connell, his attorney." On the same day the record (Ex. Rec., p. 12) shows the following:

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"On motion and for good cause shown it is ordered that F. H. Lay be, and hereby is, made a party defendant in this action and is allowed file an answer herein within twenty days." The record does not show motion of said Lay to be made a party defendant, nor the order of the court making said Tenney a party, but it is evident from the fact that said appellant Connell on the 7th day of July, 1887, filed a petition for removal as attorney for said Lay and Tenney, that the necessary steps were taken to make said Lay and Tenney parties to the suit. The said petition for removal filed July 7th, 1887 (Ex. Rec., p. 14), was signed "Frederick H. Lay and Herbert M. Tenney, by their attorney, W. J. Connell," and contained the following averments, among others: "Your petitioners, Frederick H. Lay and Herbert M. Tenney, defendants in the above-entitled suit, respectfully shows to the court that at this time and at the commencement of this action, and for a long time prior thereto, the said Frederick H. Lay was and is a citizen of the State of Colorado, and the said Herbert M. Tenney was and is a

citizen of the State of Ohio. Your petitioners further show that the said John A. Smiley, plaintiff, is a citizen of the State of Nebraska, and at the time of the commencement of said suit was a citizen of the State of Nebraska, and further say that the amount in dispute in said action exceeds the sum of $12,000, exclusive of costs, and in fact exceeds the sum of $10,000, exclusive of costs, and that each of said parties own and claim separate and distinct portions of said land."

This petition was sworn to by said Connell as attorney for said Lay and Tenney. On the same day the bond for removal was filed, and it was signed as follows: "Frederick H. Lay and Herbert M. Tenney, by their attorney, W. J. Connell." The order of removal was made on the 28th day of August, 1887 (Ex. Rec., p. 15), "and that this cause be removed into the circuit court of the United States for the district of Nebraska, and by consent of parties the said cause is removed as to said defendant Connell as well as to the other defendants." On the 15th day of February, 1888, appellant Connell filed an answer for himself and for Tenney and Lay separately (Ex. Rec., pp. 25, 29, 34). Each answer contains these words: "But this defendant denies that said deeds (from Connell to Lay and Tenney) were made after the filing of said bill, but, on the contrary, this defendant charges that said deeds were made, executed, and acknowledged on the day which they bear date." Said appellant Connell in his said answer admits that he was fully informed in regard to the interest of Lay and Tenney in the land in controversy and as to the time when their interest was acquired, for he says (Ex. Rec., p. 32), "this defendant, further answering said bill of complaint, admits that he conveyed by deed to said defendants Lay and Tenney the portion of said land in said bill of complaint described as having

been so conveyed." As shown by the record (Ex. Rec., p. 39) a decree was entered in favor of appellee and against appellants.

Argument.

Appellants contend in support of their motion to dismiss and remand to the state court, first, that their interests in the land in controversy were acquired after the commencement of this suit; second, that the petition for removal was not filed within the required time, and third, that Messrs. Lay and Tenney, upon whose petition the cause was removed, had no "separable controversy capable of removing."

The appellants are estopped from setting up all of these defences. None of the authorities cited in appellants' brief are applicable to the facts in this case. Whether the petition for removal was filed in time, in the case at bar, is a question which this court will not consider. The decision in Ayers *vs.* Watson, 113 U. S., 594, is conclusive upon this point. In that case the court state the facts and the law applicable thereto as follows: "Ayers then presented a petition for removal of the cause to the circuit court of the United States, alleging that he was a citizen of the State of Mississippi, and that the plaintiff was a citizen of the State of Texas, and that there could be a final determination of the controversy so far as he was concerned, without the presence of the other defendants as parties in the cause. The court granted the petition and the cause was removed, no objection to the removal being made either then or in the circuit court afterwards. But after the issuing of the present writ of error, at the instance of one of whom (Frank Ayers) the cause was removed, assigned for error, amongst other things, that the circuit court erred in taking jurisdiction of

the cause. In view of the position of the party who raises the objection we certainly should not feel disposed to reverse the judgment on the ground of removal of the cause, unless it was clear that the circuit court had no jurisdiction whatever to hear and determined it. * * * So, it seems to us, there is no good reason why the other party may not also waive the objection as to the time within which the application for removal is made. It does not belong to the essence of the thing; it is not, in its nature, a jurisdictional matter, but a mere rule of limitation. * * * And since the removal was effected at the instance of the party who now makes the objections we think that he is estopped." This case is exactly like the one at bar. The petition in both cases was filed after the answer day; in both cases the court allowed additional time for answer; in both cases the same party who secured the removal to the federal court asked to have the case remanded to the State court alleging the same reason, namely, that the petition for removal was filed too late. In the case at bar, as in the case cited, the decision of the court must be that the party having brought his opponent from the State court into the federal court cannot be heard now to deny that the application was made in time.

Railroad Company *vs.* Koontz, 104 U. S., 5, 17.

Appellants are not sustained in their contention by Velie *vs.* Manufactures' Accident Indemnity Company, 40 Fed. Rep., 545, for in that case the defendant after the time for answer made application for removal. The application was resisted, removal denied, and the defendant at once brought the matter before the federal court. The only other case cited by appellants on this point is, Edrington *vs.* Jefferson,

111 U. S., 770, and it is equally inappliable. In that case Mrs. Edrington was drawn into the federal court by the opposing parties after issue joined, and she at once moved to remand the cause on the ground that the application for removal came too late. The court say, "as Mrs. Edrington was kept in the district court and forced to a hearing there, she has the right, having saved her point on the record, to have that error corrected here after final decree below." In the case at bar appellants took appellee into the federal court. Of course, the record shows no effort made by appellants to remand the cause; no objection was made by them to the jurisdiction of the court, excepting the formal objection which is set forth in the decree of Hon. David J. Brewer, circuit judge, as follows: "To the jurisdiction of the court to render a decree herein the said respondents object." Appellants Lay and Tenney, then, are estopped to complain at this time because the application for removal was filed too late, for the reason that they made the application themselves, and appellant Connell is estopped from raising the question here because he not only did not raise it below, but as attorney for Lay and Tenney filed the application for removal, and the court record, which imports verity, declares that "by consent of parties the said cause is removed as to said defendant Connell as well as to the other defendants."

The court will likewise refuse to consider the first and third objections to jurisdiction set forth in appellant's brief. Whether appellants Lay and Tenney "were purchasers *pendente lite*," and whether "the removing petitioners had no separable controversy capable of removing" are questions entirely immaterial at this time. Had the questions been raised in the court below, evidence taken, and the objection preserved, advantage might be taken in this court by the objecting party if the court erred, but of course no objec-

tions were made by appellants because they removed the case from the State to the federal court. To do so they, by their attorney, said appellant Connell made every necessary allegation as shown by the record. In order to be made a party defendant said Tenney, by his attorney, appellant Connell, alleged that he had at the commencement of the action an interest in the property in controversy.

It is presumed that said appellant Lay did the same, although it is not set forth in the published record. In order to remove the cause to the federal court, said appellants, Lay and Tenney, by their attorney, said appellant Connell, stated in the petition for removal "that each of said parties own and claim separate and distinct portions of said land," and to the truth of these allegations said appellant Connell made oath. At other times during the trial and in the pleadings, as shown by the record set forth in the above statement of the case, appellants deny the truth of every material statement made in the brief of appellant's attorney in support of this motion. Even if the statements made in the trial were less comprehensive the fact that appellants at that time concealed the facts then in their possession would estop them at this time; but the case is made stronger still against them when they not only wilfully concealed the facts alleged in support of the motion for dismissal, but openly and boldly denied these facts, if they be facts, in order to compel appellee Smiley to try the cause in the federal court. If they are permitted now to deny what they affirmed in the court below, and thus secure an order remanding the cause to the State court, they can upon the same principle again affirm in the State court what they deny here and secure another removal. If the parties are thus able to play fast and loose, denying and affirming, affirming and denying, in different courts during the progress of the same suit,

there can be no final determination of a cause, and tha litigant will secure the greatest advantage who has the least regard for truth. No doctrine is more salutary than the doctrine of estoppel, and none more securely established. If any principle of law can be said to have universal application, it is the principle that where a party to a suit has solemnly declared a certain fact or condition to exist he can not be heard afterwards to dispute that declaration. The only exception is where the party is able to show that the first declaration was made by mistake and without any fault on his part. In the case at bar the appellants not only repeated the allegations which they deny here, but the facts concerning which they spoke were entirely within their possession, and no excuse could be given for their ignorance or mistake; and when it is remembered that the allegations made at that time were for the purpose of removing the cause, and now after an adverse decree the denials are made in order to secure a new trial in another court, the court certainly cannot give to appelant's contentions even serious consideration at this time. If any authority is necessary to sustain our position, the court is respectfully referred to—

Great Falls Manufacturing Co. *vs.* Attorney Gen., 124 U. S., 599.
Merchants' Bank *vs.* State Bank, 10 Wall., 604.
Morgan *vs.* R. R. Company, 96 U. S., 716.
Coffey *vs.* U. S., 116 U. S.. 442.

In the case last cited the court say, "it is a sufficient answer to this objection to say that the claimant in his answer, denies the allegations of the first count, specifically, as they are made. After that, he cannot, in the court of error, on such a record as this, be heard to say that he did not know the charge made, and could not defend against it,

although, if he had excepted or demurred to the count, the objection might have been presented for consideration."

Folger *vs.* Palmer, 35 La. An., 743.
Farrar *vs.* Stacey, 2 La. An., 211.
Gridley *vs.* Connor, 4 La. An., 416.
Durham *vs.* Williams, 32 La. An., 962.
Gilmore *vs.* O'Neal, 32 La. An., 979.

"The doctrine is so firmly sanctioned, both by reason and justice, that our courts have unhesitatingly extended the operation to the State itself."

State *vs.* Taylor, 28 La. An., 460.
State *ex rel.* Morgan, 28 La. An., 121.

In Farrar *vs.* Stacey, ante, the court say, "allegations in a petition signed by one as attorney of a third person, inconsistent wlth claims set up by him in an action in his own name commenced on the same day, will estop him from recovering."

Osborne *vs.* Logras, 29 La. An., 273.
Smith *vs.* Fowler, 12 Lea., 163.
Chilton *vs.* Scrugg, 5 Lea., 308.
Waterson and Riley *vs.* Lyons, 9 Lea., 566.
Greenleaf on evidence, sec. 27, vol. I.
McEwen *vs.* Jenks, 6 Lea., 289.
Cooley *vs.* Steel *et al.*, 2 Head., 606.
Stillman *vs.* Stilman, 7 Baxter, 169.
Oak *vs.* McCahill, 41 New Jersey Equity, 69.
Miller *vs.* Wilkins and Berrien, 79 Ga. 675.
Anderson *vs.* Clark, 70 Ga. 362.

In last case above cited the court say, "a solemn admission in *judicio* is an estoppel everywhere and forever."

Gresham *vs.* Ware, 79 Ala., 193.

Hamilton *vs.* Zimmerman, 5 Sneed, 38.
Cheney *vs.* Selman, 71 Ga. 384.
Prentice *vs.* Stefan, 72 Wisconsin, 151.

Upon the authority of these cases it is respectfully submitted that applicants cannot at this time be heard to deny that the removal was made in time; that appellants had an interest in the property in controversy in the original suit when the suit was commenced; and that their interests were separable. Motion to dismiss and remand should be denied, and judgment of the court below affirmed.

WILLIAM J. BRYAN,
Solicitor for Appellee.

156-335

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Supreme Court of the United States.

OCTOBER TERM, 1893.

Case Number, 13,977. *Term Number*, —. 14

WILLIAM J. CONNELL *et al.*, Appellants,
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} Motion to Dismiss.

Additional Brief of William J. Bryan, Solicitor for Appellee.

HARTMAN & CADICK, PRS., GLOBE OFFICE.

Supreme Court of the United States.

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Additional Brief of William J. Bryan, Solicitor for Appellee.

Appellant, in an additional brief recently filed, attempts to strengthen his contention by asserting that this court has given a new construction to the statute regulating the removal of causes, and I desire to submit a few words in reply. In his first brief appellant alleged, as one reason for remanding, that the application was made too late in the State court. In my reply I showed (on the authority of Ayers *vs.* Watson, 113 U. S., 594) that that objection was entirely untenable.

Appellant does not refer to this point in his second brief but insists that Lay and Tenny were purchasers *pendente lite*, and therefore could not exercise the right of removal on the ground of diverse citizenship.

He contends that the deeds to Lay and Tenny were not recorded before the commencement of the suit, and that, therefore, they took *pendente lite*. He does not cite the court to any evidence showing a failure to record the deeds, nor does he deny that they were recorded, but bases his argument upon the allegation of appellee that the deeds were not recorded prior to the commencement of the suit, and upon the fact that Lay and Tenny in their answers only allege that the deeds were "made, executed and acknowledged" before

the commencement of the suit. I submit that the recording of the deed is not necessary in order to convey title, except as against innocent persons without notice. The rule in regard to recording deeds is intended to adjust the equities between two purchasers by putting the loss upon the person who is guilty of negligence. But if the recording of a deed was necessary to convey an interest the allegation made by appellant was sufficient, for the record shows (see Ex. Rec., page 11) that on the 18th of June, 1887, he filed a motion in the district court of Douglas county, Nebraska, in this case, and in that motion used the following language:

"And now comes Herbert M. Tenny and hereby represents that he has, AND AT THE TIME OF THE COMMENCEMENT OF THIS ACTION DID HAVE, an interest in the property in controversy herein. * * * * *

HERBERT M. TENNY,
By W. J. CONNELL, *His Attorney.*"

Again on the 7th of July, 1887, in the answer filed by appellant and verified by his own oath (see Ex. Rec., page 13) cppellant says: "And said defendant further saith that PRIOR TO COMMENCEMENT OF THIS ACTION A PORTION OF SAID PREMISES WAS CONVEYED BY DEED to Herbert M. Tenny and F. H. Lay."

Since Tenny and Lay derived title by a deed from Appellant Connell himself, he had personal knowledge of the truth or falsity of the statements made, and he cannot shield himself behind the excuse that he did not know the meaning of the words employed. Shall the appellant be permitted to have his case remanded on the ground that his allegations were denied by appellee? Or, would he stand better if he could now show by testimony that his allegations were not only denied but actually disproven? Or, could the appellant make his case still stronger if he could show that his allegations were not only disproven but were made for the purpose of imposing on the court and thus securing a removal of the cause?

Appellant's contention that the causes were not shown to be separable is equally unsupported. In order to secure a

removal appellant as attorney for Lay and Tenny (see Ex. Rec., page 14) filed a petition, verified by his own oath, in which he said: "And that each of said parties own and claim separate and distinct portions of said land."

He has cited several cases, but none of them hold that such a statement as the above is not sufficient. He places great reliance on Hakes *vs.* Burns, 40 Fed. Rep., 33, but there is not the least similarity between that case and the case at bar. Justice Brewer expressly distinguished that case from this when he said: "Whatever might be the rule if the intervenor presented some new and independent interest or question," and stated that that case did not present any new question or independent interest.

Nor is his citation of Barth *vs.* Coler, 60 Fed. Rep., 466, any more fortunate, for the facts in that case are entirely different from the facts presented in the case at bar. An examination of the other cases cited by him fails to disclose a single case which supports the position taken by him.

The simple question presented by the facts in this case is this: can appellant, as attorney for other parties, make allegation legally sufficient to obtain a removal of a cause from a State to a Federal court, and then, after judgment against him in the Federal court, deny those allegations in order to remand the case to the State court and secure a new trial? The authorities on estoppel cited in my former brief are conclusive, and he makes no attempt to reply to them in his additional brief. If all the evidence were before the court the wrong inflicted on appellee by appellant would be more apparent, but the court will find even in that portion of the record presented by the appellant sufficient evidence of the injustice practiced by the appellant upon the appellee for seven long years, while the latter has been struggling to obtain possession of his property. Appellant has not been able to give even a plausible—not to say a sound—reason why appellee should be longer delayed.

WILLIAM J. BRYAN,

Solicitor for Appellee.